(24,599)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 381.

WILLIAM A. HARTRANFT, PLAINTIFF IN ERROR,

vs.

ALEXANDER R. MULLOWNY, JUDGE OF THE POLICE COURT OF THE DISTRICT OF COLUMBIA.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

& Detweiler (Inc.), Printers, Washington, D. C., December 30, 1915.

1 Court of Appeals of the District of Columbia.

No. 2725.

WILLIAM A. HARTRANFT, Appellant,
vs.
ALEXANDER R. MULLOWNY, Judge of the Police Court of the District of Columbia.

Supreme Court of the District of Columbia.

No. 56887. At Law.

WILLIAM A. HARTRANFT, Plaintiff,
vs.
ALEXANDER R. MULLOWNY, Judge of the Police Court of the District of Columbia, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Petition for Certiorari.

Filed May 7, 1914.

In the Supreme Court of the District of Columbia.

56887. At Law.

WILLIAM A. HARTRANFT, Petitioner,
vs.
ALEXANDER R. MULLOWNY, Judge of the Police Court of the District of Columbia, Respondent.

The petitioner states as follows:

1. He is a citizen of the United States and a resident of the District of Columbia, and files this petition in his own right.

2 2. The respondent is a citizen of the United States and a resident of the District of Columbia, and is one of the Judges of the Police Court of the said District.

3. On the said 17th day of April, A. D. 1914, there was filed in the said Police Court by Clarence R. Wilson, Esquire, Attorney of the United States in and for the District of Columbia, against the petitioner, a certain information in seven counts, charging seven

separate and distinct violations by the petitioner of the Food and Drugs Act, so-called, of the Congress of the United States, of June 30, 1906, a copy of which said information is hereto annexed marked "Exhibit A," and prayed to be taken as part hereof.

4. On the 20th day of April, A. D. 1914, the petitioner, by his attorneys, filed in the cause instituted by the filing of the said information a motion to quash the same, a copy whereof, marked "Exhibit B," is hereto annexed and prayed to be taken as part hereof, which said motion was by the respondent, sitting in the said cause, overruled.

5. Upon the overruling of his said motion to quash as aforesaid, the petitioner, by his attorneys, on the 21st day of April, A. D. 1914, filed in the said cause a motion for a bill of particulars, whereof a copy, marked "Exhibit C," is hereto annexed and prayed to be taken as part hereof, which said motion was by the respondent duly granted.

6. Upon the granting of the petitioner's said motion for a bill of particulars, the United States, by its attorney, on the said 21st day of April, A. D. 1914, filed as and for such bill of particulars a paper writing, whereof a copy, marked "Exhibit D," is hereto annexed and prayed to be taken as part hereof.

7. Upon the filing of the said paper writing as aforesaid, the petitioner, on the 23rd day of April, A. D. 1914, by his attorneys, filed in the said cause a motion for a more specific bill of particulars, a copy whereof, marked "Exhibit E," is annexed hereto and prayed to be taken as part hereof, which said motion the respondent, on the said last mentioned day, overruled.

8. Thereafter, and on the 5th day of May, A. D. 1914, the petitioner, by his attorneys, filed in the said cause a demurrer to the information therein, upon the identical grounds assigned in support of his motion to quash the information as aforesaid, which said demurrer the respondent overruled.

9. Thereafter, and on the said 5th day of May, A. D. 1914, the petitioner, in his proper person, filed a special plea in bar to the said information, upon the ground, among others, that the court in which the respondent was presiding, to wit, the said Police Court of the District of Columbia, was without jurisdiction to try the said information, as, in case of conviction of the petitioner upon the same, he, the petitioner, might be subjected by the judgment of the said court, to a greater punishment than it is lawfully within its power to inflict, namely, the punishment of seven separate and distinct fines in the amount of Two hundred Dollars ($200) each, and, in default of the payment of the same, seven separate and distinct commitments to imprisonment for the period of one year each, or a punishment in all of fines to the amount of Fourteen hundred Dollars ($1,400), and, in default of the payment thereof, imprisonment for a period of seven years, in the aggregate; which plea, on motion in that behalf by the United States, by its attorney, the respondent ordered to be stricken out and struck out, on the 6th day of May, A. D. 1914.

10. Thereupon, on the said 6th day of May, A. D. 1914, the peti-

tioner, by his attorneys, filed in the said cause a motion to compel the United States to elect upon which of the said counts in the said information it would try him, the petitioner, a copy of which said motion, marked "Exhibit F," is hereto annexed and prayed to be taken as part hereof; and the respondent, on the said last-mentioned day, overruled the said last-mentioned motion.

11. Thereupon, and on the said 6th day of May, A. D. 1914, the petitioner was arraigned upon the said information and pleaded not guilty thereto, and demanded a trial thereon by jury, which was, by the respondent, granted and set for the 20th day of May, A. D. 1914, to be had by and before him, the respondent, as judge aforesaid.

12. All of the foregoing proceedings were had and taken upon the information aforesaid in cause designated and numbered as United States vs. William A. Hartranft, No. 192,779, and in all the proceedings and the actions had and taken by the respondent, as aforesaid, the respondent was sitting in and presiding over the said Police Court of the District of Columbia as one of the judges thereof.

13. By the terms and provisions of the said Food and Drugs Act, so-called, it is, among other things, provided by Section 2 thereof, any person, who shall sell or offer for sale in the District of Columbia any food adulterated within the meaning of the said Act, shall be guilty of a misdemeanor, and for such offense be fined not exceeding Two hundred Dollars ($200) for the first offense, and, upon conviction, for each subsequent offense not exceeding Three hundred Dollars ($300), or be imprisoned not exceeding one year, or both, in the discretion of the court; and by Section 4 thereof, that, after judgment of a court in any case arising under said Act, notice thereof shall be given by publication in such manner as may be prescribed by rules and regulations for carrying out the provisions of the said Act made, as therein and thereby provided; which said rules and regulations have been duly made, and in accordance therewith notice of every such judgment as aforesaid, notwithstanding any pending appeal therefrom, is publicly given by the Department of Agriculture of the United States, or the Secretary thereof, and the same distributed at large throughout the United States; wherefore, if the petitioner be convicted upon the information aforesaid, notice of such, his conviction, will be published and distributed as aforesaid, as well to his competitors in business as to the public of the United States in general, to his great discredit and disadvantage, and by way of punishment in excess of and in addition to that by fine and imprisonment as aforesaid.

14. In and by Section 43 of the Code of Law for the District of Columbia, it is enacted and provided, among other things, that the said Police Court of the District of Columbia shall have original jurisdiction concurrently with the Supreme Court of the District, except where otherwise expressly in the said Code provided, of all crimes and offenses committed in the said District not capital or otherwise infamous, and not punishable by imprisonment in the penitentiary, except libel, conspiracy, and violation of the Post Office and Pension laws of the United States; by

Section 934 of the said Code, it is, among other things, enacted and provided as follows: "When any person is sentenced for a term longer than six months and not longer than one year, such imprisonment shall be in the jail, and where the sentence is imprisonment for more than one year, it shall be in the penitentiary. Cumulative sentences aggregating more than one year shall be deemed one sentence for the purposes of the foregoing provision. When the punishment of an offense may be imprisonment for more than one year, the prosecution shall be in the Supreme Court of the District. When the maximum punishment is a fine only or imprisonment for one year or less, the prosecution may be in the Police Court," meaning the said Police Court of the District of Columbia; by Section 44 of the said Code, it is, among other things, enacted and provided that in all cases where the said Police Court shall impose a fine, it may in default of the payment of the fine imposed, commit the defendant for such a term as the court thinks right and proper, not to exceed one year; and by Section 227 of the said Code, it is, among other things, enacted and provided, that under certain circumstances and upon compliance with certain conditions, any justice of the Court of Appeals of the said District may, if in his opinion proper, allow a writ of error in any cause tried in the said Police Court, but is not obliged so to do; wherefore, if the petitioner be convicted in the said Police Court upon the information aforesaid, he will be without right, as of course, to have his conviction reviewed and any errors of law that may be committed upon his trial corrected, but will be dependent for a review of his conviction or the correction of such errors upon the judgment and discretion of a justice of the said Court of Appeals, and upon such only, and without opportunity to be heard in respect of any petition or application for such review or correction other than by presenting such petition or application and the grounds thereof to such justice for his consideration.

15. Should the petitioner be convicted in the said Police Court upon the said information and fined as aforesaid, with the alternative of imprisonment, in case of his inability to pay such sum or sums as may be assessed against him by way of fine, he will be obliged to serve and undergo such imprisonment, without right or opportunity of relief therefrom, save and except by pardon; whereas, if he were tried and convicted on the said information in this, the Supreme Court of the District of Columbia, or any District Court of the United States, and be unable to pay such sum or sums as aforesaid, he would have the right and remedy of being released from imprisonment on account thereof, in accordance with the provisions in that behalf of Section 1042 of the Revised Statutes of the United States; by reason whereof, if the said Police Court of the District of Columbia have jurisdiciion of such alleged violations of the Food and Drugs Act, so-called, as purport to be set forth in the said information, the punitive force and effect of the said Act in the District of Columbia will be greater than elsewhere throughout the United States, giving the said Police Court greater jurisdiction and power in the administration of the said Act

than is, or could be, had and exercised by any other court within the United States, thereby making the operation of the said Act unequal and denying to persons within the jurisdiction of the District of Columbia equal protection with those resident within other jurisdictions of the United States.

16. The petitioner is advised, and therefore avers, that, even if said Police Court of the District of Columbia has jurisdiction of his person in respect of the matter purporting to be set forth in the said information, the said information does not sufficiently or at all inform him of the nature and cause of the accusation against him, and, accordingly, that his attempted trial thereon would deny him his Constitutional right in that behalf, and deprive him of protection therein.

17. The Police Court of the District of Columbia, of which as aforesaid the respondent is a judge presiding in the matter of the petitioner hereinbefore set forth, is without jurisdiction to try the petitioner upon the said information, for the following, among other, reasons:

(1) In and by the said Food and Drugs Act, so-called, it is enacted and provided that violations of the provisions thereof shall be "prosecuted in the proper courts of the United States," and the said Police Court is not such a Court, because (*a*) if any person prosecuted therein for a first offense against the said Act should be convicted and fined, and unable to pay the fine imposed, he would be subject to possible imprisonment for one year, whereas, no such alternative penalty could be inflicted upon a person so prosecuted and convicted in any other court; and (*b*) the said Police Court could not try any person charged with a second offense against said Act, for that the penalty for such second offense is beyond the jurisdictional power of the said Court to impose.

(2) A person prosecuted in the said Police Court for any violation of the said Act would have no right of appeal from his conviction, or writ of error in respect thereof, whereas such right, as of course, would belong to any person so prosecuted in any other court.

(3) The joinder in the said information of seven separate and distinct offenses makes possible, as aforesaid, the imposition by the said Police Court, by a single judgment in the said cause, of a penalty beyond the jurisdictional power of the said Court to impose; and

(4) The said information, whether of itself or in connection with the pretended bill of particulars filed thereunder, does not sufficiently, or at all, inform the petitioner of the nature and cause of the accusation against him.

The premises considered, the petitioner therefore prays that the writ of certiorari may issue from this Court to the respondent,
6 commanding him to certify to this Court the record and proceedings in the said cause so as aforesaid instituted and pending against the petitioner, to the end that the same may be considered by this Court, and that there may be done in behalf thereof what of law and right ought to be done in the premises, and that to

this end all necessary orders may be made and proceedings had, and the defendant may have such other and further relief in the premises as may be according to the law, right and justice of the matter.

WILLIAM A. HARTRANFT,
Petitioner.

HENRY E. DAVIS,
MATTHEW E. O'BRIEN,
Attorneys for Petitioner.

DISTRICT OF COLUMBIA, ss:

Before me, a Notary Public in and for the District aforesaid, personally appeared William A. Hartranft, who being by me first duly sworn, deposes and says, that he knows the contents of the foregoing petition by him subscribed, and that the matters and things therein stated of his knowledge he knows to be true, and those stated on information and belief he believes to be true; and further, that the said petition is not for the purpose of delay, but is made in good faith and in the belief, which he hereby avers, that he has a just and meritorious right to the relief thereby prayed.

WILLIAM A. HARTRANFT.

Subscribed and sworn to before me this 7th day of May, A. D. 1914.

[SEAL.] CLARA M. REICHENBACH,
Notary Public, D. C.

(Endorsed:) Let this writ issue as prayed. Ashley M. Gould, Justice.

Writ of Certiorari.

Issued May 7, 1914.

* * * * * * *

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Alexander R. Mullowny, Judge of the Police Court of the District of Columbia, Greeting:

Being informed that there is now pending before you a suit between the United States and the above-named petitioner, William A. Hartranft, information No. 192,779, and we, being willing for certain reasons that the record and proceedings therein should be certified by you and removed into the Supreme Court of the
7 District of Columbia, do command that you send without delay to the Supreme Court of the said District, the record and proceedings in the said cause, so that the said Supreme Court may act therein as of right and according to the laws and customs of the United States should be done.

Witness the Honorable Job Barnard, Senior Justice of the Supreme Court of the District of Columbia, the 7th day of May, A. D. 1914.

[SEAL.] J. R. YOUNG,
Clerk Supreme Court, District of Columbia,
By ALF. G. BUHRMAN, *Ass't Cl'k.*

Marshal's Return.

Served copy of within writ on Alexander R. Mullowney, Judge of the Police Court of the District of Columbia, personally.
May 7, 1914.

MAURICE SPLAIN, *Marshal.*
C. R. S.

Return to Writ.

Filed May 11, 1914.

Information.

In the Police Court of the District of Columbia, April Term, A. D. 1914.

DISTRICT OF COLUMBIA, *ss:*

Clarence R. Wilson, Esquire, Attorney of the United States in and for the District of Columbia, comes here unto Court, at the District aforesaid, on the seventeenth day of April, in the year of our Lord one thousand nine hundred and fourteen, in this said term, and for the United States gives the Court here to understand and be informed, on the oath of one Louis V. Dieter, that one William A. Hartranft, late of the District aforesaid, on, to wit, the second day of June, in the year of our Lord one thousand nine hundred and thirteen, at the District aforesaid, and within the jurisdiction of this Court, unlawfully did offer for sale and did sell to one Harry J. Mulligan a certain adulterated article of food, that is to say, a certain quantity of milk, which said food was adulterated, in that it did consist in whole and in part of a filthy and decomposed and putrid animal and vegetable substance; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

Second Count.

And the said Clarence R. Wilson, Esquire, Attorney of the United States in and for the District of Columbia, for the said United States gives the Court here further to understand and be informed, on the oath of the said Louis V. Dieter, that the said William A. Hartranft, late of the District aforesaid, on, to wit, the ninth day of September, in the year of our Lord one thousand nine

hundred and thirteen, at the District aforesaid, and within the jurisdiction of this Court, unlawfully did offer for sale and did sell to one Harry S. Lucas a certain adulterated article of food, that is to say, a certain quantity of milk, which said food was adulterated in that it did consist in whole and in part of a filthy and decomposed and putrid animal and vegetable substance; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

Third Count.

And the said Clarence R. Wilson, Esquire, Attorney of the United States in and for the District of Columbia, for the said United States gives the Court here further to understand and be informed, on the oath if the said Louis V. Dieter, that the said William A. Hartranft, late of the District aforesaid, on, to wit, the twenty-third day of September, in the year of our Lord one thousand nine hundred and thirteen, at the District aforesaid, and within the jurisdiction of this Court, unlawfully did offer for sale and did sell to one Harry J. Mulligan a certain adulterated article of food, that is to say, a certain quantity of milk, which said food was adulterated in that it did consist in whole and in part of a filthy and decomposed and putrid animal and vegetable substance; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

Fourth Count.

And the said Clarence R. Wilson, Esquire, Attorney of the United States in and for the District of Columbia, for the said United States gives the Court here further to understand and be informed, on the oath of the said Louis V. Dieter, that the said William A. Hartranft, late of the District aforesaid, on, to wit, the tenth day of October, in the year of our Lord one thousand nine hundred and thirteen, at the District aforesaid, and within the jurisdiction of this Court, unlawfully did offer for sale and did sell to one Harry J. Mulligan a certain adulterated article of food, that is to say a certain quantity of milk, which said food was adulterated in that it did consist in whole and in part of a filthy and decomposed and putrid animal and vegetable substance; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

Fifth Count.

And the said Clarence R. Wilson, Esquire, Attorney of the United States in and for the District of Columbia, for the said United States gives the Court here further to understand and be informed, on the oath of the said Louis V. Dieter, that the said William A.

9 Hartranft, late of the District aforesaid, on, to wit, the twenty-first day of November, in the year of our Lord one thousand nine hundred and thirteen, at the District aforesaid, and within the jurisdiction of this Court, unlawfully did offer for sale and did sell

to one Harry S. Lucas a certain adulterated article of food, that is to say, a certain quantity of milk, which said food was adulterated in that it did consist in whole and in part of a filthy and decomposed and putrid animal and vegetable substance; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

Sixth Count.

And the said Clarence R. Wilson, Esquire, Attorney of the United States in and for the District of Columbia, for the said United States gives the Court here further to understand and be informed, on the oath of the said Louis V. Dieter, that the said William A. Hartranft, late of the District aforesaid, on, to wit, the twenty-seventh day of December, in the year of our Lord one thousand nine hundred and thirteen, at the District aforesaid, and within the jurisdiction of this Court, unlawfully did offer for sale and did sell to one Harry J. Mulligan a certain adulterated article of food, that is to say, a certain quantity of milk, which said food was adulterated in that it did consist in whole and in part of a filthy and decomposed and putrid animal and vegetable substance; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

Seventh Count.

And the said Clarence R. Wilson, Esquire, Attorney of the United States in and for the District of Columbia, for the said United States gives the Court here further to understand and be informed, on the oath of the said Louis V. Dieter, that the said William A. Hartranft, late of the District aforesaid, on, to wit, the second day of February, in the year of our Lord one thousand nine hundred and fourteen, at the District aforesaid, and within the jurisdiction of this Court, unlawfully did offer for sale and did sell to one Harry J. Mulligan a certain adulterated article of food, that is to say, a certain quantity of milk, which said food was adulterated in that it did consist in whole and in part of a filthy and decomposed and putrid animal and vegetable substance; against the form of the statute in such case made and provided, and agninst the peace and government of the said United States.

Whereupon, the said Attorney of the United States, in manner and form aforesaid, prays the consideration of the Court here in the premises, and that due proceedings may be had against the said William A. Hartranft, in this behalf, to make him answer to the said United States touching and concerning the premises aforesaid.

CLARENCE R. WILSON,
Attorney of the United States in and
for the District of Columbia.

10 Personally appeared Louis V. Dieter before me this 17th day of April, A. D. 1914, and being duly sworn according to

law doth declare and say that the facts set forth in the foregoing information are true.

RALPH GIVEN,
Assistant Attorney of the United States in and for the District of Columbia.

(Endorsed:) District No. 192,779. United States vs. William A. Hartranft. May 6, 1914. Jury Trial Demanded. Violation of Food & Drugs Act of June 30, 1906. May 6, 1914. P. N. G. J. T. D. 4/20/1914. Motion to quash information filed 4/21/1914. Motion argued and overruled. Motion for bill of particulars filed. Motion argued and granted. Bill of particulars filed 4-23-1914. Motion for a more specific bill of particulars filed 4/28/1914. Motion for a further bill of particulars argued and overruled. 5/5/1914. Demurrer to information filed—argued & overruled. Special plea in Bar filed 5-6-1914. Motion to strike out special plea in bar filed. Motion argued & granted with all the first paragraph stricken out after the words "1914" and the 4th and 6th grounds of the motion. Motion to compel an election filed. Motion argued & overruled May 7", 1914. Writ of certiorari rec'd from Supreme Court D. C. Filed Apr. 17, 1914. F. A. Sebring, Clerk, Police Court, D. C. May 10th, 1914. Papers and proceedings transmitted to the Clerk Supreme Court, D. C., in obedience to Writ of certiorari.

Motion to Quash Information.

* * * * * * *

Comes now the defendant in the above entitled cause, by his attorneys, and moves the court to quash the information in the above entitled cause, upon the following grounds:

1. The said information fails to state of what filthy, decomposed or putrid animal substance the milk therein mentioned is claimed to have consisted, in whole or in part.

2. The said information fails to state of what filthy, decomposed or putrid vegetable substance the milk therein mentioned is claimed to have consisted, in whole or in part.

3. The said information fails to state wherein either of the said substances, animal or vegetable, in the information mentioned, is claimed to have been filthy.

4. The said information fails to state wherein either of the said substances, animal or vegetable, in the information mentioned, is claimed to have been decomposed.

5. The said information fails to state wherein either of the said substances, animal or vegetable, in the information mentioned, is claimed to have been putrid.

6. The said information fails to allege that either of the said substances, animal or vegetable, in the information mentioned, was injurious to health.

11 7. The said information is vague and indefinite, and fails sufficiently, or at all, to set out any matter in respect of

which the said milk is claimed to have consisted, in whole or in part, of any filthy, decomposed or putrid animal or vegetable substance, in contemplation of the statute under which the said information is supposed to have been filed.

8. Because the said information fails to state or allege an offense cognizable by law.

9. Because the said information improperly joins several separate and independent alleged offenses not arising out of the same transaction and not dependent upon the same evidence.

HENRY E. DAVIS,
MATTHEW E. O'BRIEN,
Attorneys for Defendant.

Motion for Bill of Particulars.

* * * * * * *

Comes now the defendant in the above entitled cause, by his attorneys, and moves the court to require the United States to give him, the defendant, a bill of particulars in respect of the following matters:

1. The filthy, decomposed or putrid animal substance of which, as it is alleged in the information, the milk therein mentioned is claimed to have consisted in whole or in part.

2. The filthy, decomposed or putrid vegetable substance of which, as it is alleged in the information, the milk therein mentioned is claimed to have consisted in whole or in part.

3. Wherein either of the said substances, animal or vegetable, in the information mentioned, is claimed to have been filthy.

4. Wherein either of the said substances, animal or vegetable, in the information mentioned, is claimed to have been decomposed.

5. Wherein either of the said substances, animal or vegetable, in the information mentioned, is claimed to have been putrid.

6. Wherein either of the said substances, animal or vegetable, in the information mentioned, is claimed to have been injurious to health.

HENRY E. DAVIS,
MATTHEW E. O'BRIEN,
Attorneys for Defendant.

Bill of Particulars.

* * * * * * *

Now comes the United States, by its Attorney, Clarence R. Wilson, and says that the said food was adulterated in that it contained bacteria, including the colon bacillus and streptococci, indicating filth and decomposition.

CLARENCE R. WILSON,
Attorney of the United States in and for the District of Columbia.

12 *Motion for a More Specific Bill of Particulars.*

* * * * * * *

Comes now the defendant in the above entitled cause, by his attorneys, and moves the court to require the United States to give him, the defendant, a more specific bill of particulars, upon the following grounds:

1. The bill of particulars heretofore furnished does not specify any animal substance claimed or alleged to be filthy, decomposed or putrid.
2. The said bill does not specify any vegetable substance claimed or alleged to be filthy, decomposed or putrid.
3. The said bill does not specify any animal or vegetable substance claimed to be dangerous to health.
4. The said bill does not specify wherein the certain bacteria therein mentioned, whether the same be animal or vegetable, are filthy, decomposed or putrid.
5. The said bill does not specify wherein, or in what manner, the said bacteria indicate filth and decomposition, or either.
6. The said bill does not specify any filthy, decomposed or putrid animal or vegetable substance, but only matter claimed to indicate filth and decomposition, wherefore the said bill purports to specify matter of evidence only.
7. The said bill of particulars is vague, indefinite and uncertain, and conveys no information respecting any filthy, decomposed or putrid substance, animal or vegetable, of which the certain food therein mentioned is claimed to consist, whether in whole or in part.
8. The said bill is not, either in fact or in law, a bill of particulars.

HENRY E. DAVIS,
MATTHEW E. O'BRIEN,
Attorneys for Defendant.

Demurrer.

* * * * * * *

Comes now the defendant in the above entitled cause, by his attorneys, and says that the information in the said cause is bad in substance.

HENRY E. DAVIS,
MATTHEW E. O'BRIEN,
Attorneys for Defendant.

NOTE.—Among the matters of law intended to be argued in support of the foregoing demurrer are the following:

1. The said information fails to state of what filthy decomposed or putrid animal substance the milk therein mentioned is claimed to have consisted, in whole or in part.
2. The said information fails to state of what filthy, decomposed

or putrid vegetable substance the milk therein mentioned is claimed to have consisted, in whole or in part.

13 3. The said information fails to state wherein either of the said substances, animal or vegetable, in the information mentioned, is claimed to have been filthy.

4. The said information fails to state wherein either of the said substances, animal or vegetable, in the information mentioned, is claimed to have been decomposed.

5. The said information fails to state wherein either of the said substances, animal or vegetable, in the information mentioned, is claimed to have been putrid.

6. The said information fails to allege that either of the substances, animal or vegetable, in the information mentioned, was injurious to health.

7. The said information is vague and indefinite and fails sufficiently, or at all, to set out any matter in respect of which the said milk is claimed to have consisted, in whole or in part, of any filthy, decomposed, or putrid animal or vegetable substance in contemplation of the statute under which the said information is supposed to have been filed.

8. Because the said information fails to state or allege an offense cognizable in law.

9. Because the said information improperly joins several separate and independent alleged offenses not arising out of the same transaction and not dependent upon the same evidence.

Special Plea in Bar.

* * * * * * *

Comes now the defendant in the above entitled cause and for plea says that he ought not to be required to answer the information filed herein by the United States because neither said information nor the Bill of Particulars filed in conjunction with said information states anything sufficient in law to constitute an offense punishable in this court for the following reasons:

First. The court is without jurisdiction to try the alleged offenses joined together in the information as the maximum penalty that might be imposed, were the defendant properly charged of the offenses enumerated in the information would exceed the jurisdiction of this court.

Second. Neither the information nor the Bill of Particulars states that the milk alleged to have been sold by the defendant contained any substance alleged to be injurious to health.

Third. Neither the information nor the Bill of Particulars states that said milk consisted in whole or in part of any filthy, decomposed or putrid animal substance.

Fourth. Neither the information nor the Bill of Particulars states that said milk consisted in whole or in part of any vegetable substance.

Fifth. Neither the information nor the Bill of Particulars state

any substance, either animal or vegetable, that said milk contained or consisted of, in whole or in part, that was decomposed.

Sixth. Neither the information nor the Bill of Particulars
14 state any substance, either animal or vegetable, that said milk contained in whole or in part that was filthy.

Seventh. Neither the information nor the Bill of Particulars state any substance, either animal or vegetable, that said milk contained, in whole or in part, that was putrid.

Eighth. Neither the information nor the Bill of Particulars state any substance that has been mixed or packed with said milk, so as to reduce or lower or injuriously affect its quality or strength.

Ninth. Neither the information nor the Bill of Particulars state any substance that has been substituted wholly or in part for the article alleged to have been sold by the defendant.

Tenth. Neither the information nor the Bill of Particulars state that any valuable constituent of the milk alleged to have been sold by the defendant has been wholly or in part abstracted.

Eleventh. Neither the information nor the Bill of Particulars state that the milk alleged to have been sold by the defendant has been colored, powdered, coated, or stained in a manner whereby damage or inferiority of the said milk was concealed.

Twelfth. Neither the information nor the Bill of Particulars state any added poisonous or other deleterious ingredients which might render said milk injurious to health was contained in said milk.

Thirteenth. Neither the information nor the Bill of Particulars state that the milk alleged to have been sold by the defendant was the product of a diseased animal.

Fourteenth. Neither the information nor the Bill of Particulars make any positive averment of the charge against the defendant.

Fifteenth. Neither the information nor the Bill of Particulars inform the defendant of the nature and cause of the accusation against him.

Sixteenth. Neither the information nor the Bill of Particulars state wherein the defendant has violated the statute under which the prosecution is alleged to have been brought.

Seventeenth. Because the alleged Bill of Particulars simply declares that the said milk contained "bacteria, including colon bacilli and streptococci, indicating filth and decomposition," without stating positively that said milk did contain filth and decomposition of any kind, either animal or vegetable.

Eighteenth. Because bacteria is a normal constituent of milk and the fact that milk contains the same does not authorize a prosecution.

Nineteenth. Because the colon bacilli is found in all milk and is a normal constituent of milk.

Twentieth. Because streptococci is found in all milk and is a normal constituent of milk.

Twenty-first. Because neither the information nor the Bill of Particulars state the kind or quantity of the bacteria alleged to have been found in the milk alleged to have been sold by the defendant.

Twenty-second. Because neither the information nor the Bill of

Particulars state the kind or quantity of the colon bacilli al-
15 leged to have been found in the milk alleged have been sold by the defendant.

Twenty-third. Because neither the information nor the Bill of Particulars state the kind or quantity of the streptococci alleged to have been found in the milk alleged to have been sold by the defendant.

Twenty-fourth. Because neither the information nor the Bill of Particulars state the kind or the quantity of any bacteria, either vegetable or animal, that it is alleged made the milk alleged to have been sold by the defendant either filthy, putrid or decomposed, in whole or in part.

Twenty-fifth. Because it is a scientific fact that without knowing the kind or quantity of the different bacteria which it is alleged said milk contained in whole or in part, no one can say whether it was either filthy, putrid or decomposed in whole or in part.

Twenty-sixth. Because it is a scientific fact that milk containing all that it is alleged was contained in the milk alleged to have been sold by the defendant, either by the information or the Bill of Particulars, fails to render said milk other than a pure, wholesome and fit article of food under the law.

And these facts the defendant is ready to verify.

These premises considered, the defendant has committed no offense against the laws of the land, that no specific charge against him has been made, either by the information or the Bill of Particulars and that he ought not to be held to answer to the charges alleged against him, but should be allowed to go without day.

WM. A. HARTRANFT, *Defendant.*

HENRY E. DAVIS,
MATTHEW E. O'BRIEN,
Attorneys for Defendant.

Motion to Strike Out Special Plea in Bar.

* * * * * * *

Now comes the United States of America, by its attorney, and moves the Court to strike out the paper-writing entitled "special plea in bar," filed in the above-entitled cause on the fifth day of May, 1914, for that said paper-writing is impertinent and frivolous and was filed only for the purpose of delay and to the end of hindering the administration of justice in this cause.

The grounds of this motion are:

1. Said paper-writing is no pleading known to the practice of this Court or to the law.

2. Said paper-writing, entitled "special plea in bar," is, if it can be deemed to have any meaning or effect, a demurrer.

3. If said paper-writing be deemed and treated as a "special plea in bar," it is bad because,

(a) It is argumentative,

(b) It is duplicitous,

(c) It amounts to the general issue,

16 (d) It is neither a plea in confession and avoidance nor a traverse,

(e) If it be treated as a plea in confession and avoidance, it neither confesses nor avoids,

(f) If it be treated as a traverse, it traverses nothing,

(g) If it be treated as a traverse, and if it be deemed that it traverses anything in the information contained, it traverses only matters of law.

4. Said paper-writing is frivolous, because the only purpose in filing it was to procure further delay.

5. Said paper-writing is frivolous, because it is without meaning, sense, or any legal effect whatever.

6. Said paper-writing is filed plainly only for the purpose of deferring, delaying, and defeating the administration of justice in this cause.

CLARENCE R. WILSON,
Attorney of the United States in and for the District of Columbia.
WALTER BRUCE HOWE,
JAMES A. COBB,
Ass't U. S. Attorneys.

Motion to Compel an Election.

* * * * * * *

Comes now the defendant in the above entitled cause, and by his attorneys, moves the court to require the Government of the United States to elect on which one of the counts of the information filed in said cause it will proceed, for the reasons following:

First. Because said information contains seven separate and distinct charges, growing out of seven separate and distinct transactions alleged to have occurred on seven separate and distinct dates and the joining together in a single information of these seven separate and distinct offenses will embarrass the defendant in making his defense as the jury may be led to believe that the evidence of one corroborates the evidence given in support of another of the offenses charged.

Second. Because under the law the Court is without jurisdiction to try these offenses when joined together in a single information, since the law provides a different penalty for the second and subsequent offenses than is prescribed for the first offense, and the maximum penalty that may be imposed for the offenses charged in the information, had they been properly charged under the law in separate informations is greater than the maximum punishment that the Police Court of the District of Columbia has jurisdiction to impose.

HENRY E. DAVIS,
MATTHEW E. O'BRIEN,
Attorneys for Defendant.

17 *Motion to Quash Writ of Certiorari.*

Filed May 14, 1914.

In the Supreme Court of the District of Columbia.

No. 56887. At Law.

WILLIAM A. HARTRANFT, Petitioner,
vs.
ALEXANDER R. MULLOWNY, Judge of the Police Court of the District of Columbia, Respondent.

Now comes the Respondent, by his Attorney, Clarence R. Wilson, United States Attorney in and for the District of Columbia, and moves the Court to quash the writ of certiorari issued herein on the 7th day of May, A. D. 1914, for the following reason, to wit,

1. That the Police Court of the District of Columbia has jurisdiction and has assumed jurisdiction of the cause of action entitled United States versus William A. Hartranft, No. — in the Police Court of the District of Columbia.

CLARENCE R. WILSON,
United States Attorney in and for the District of Columbia, Attorney for the Respondent.

Please take notice that the above motion will be called for hearing before Hon. Job Barnard, Justice, in Circuit Court No. 1, on Tuesday, May 19, 1914, at 3 o'clock P. M.

CLARENCE R. WILSON.
W. B. H.

Service of a copy of the above motion and notice is hereby acknowledged. May 14th, 1914.

HENRY E. DAVIS,
MATTHEW E. O'BRIEN,
Counsel for Petitioner.

Opinion of Court.

Filed June 2, 1914.

* * * * * * *

In this case a petition is filed for a writ of certiorari, requiring the respondent to certify to this court the record and proceedings in a certain cause instituted and pending in the said Police Court against the petitioner, to the end that what by right and law ought to be done in the premises, shall be done by this court.

The proceeding in the Police Court was begun on April 17, 1914, by the filing of an information by Clarence R. Wilson, attorney of

the United States for the District of Columbia, wherein it was
18 charged, in seven separate and distinct counts, that the petitioner was guilty of violations of the pure food and drugs act of June 30, 1906, (34 Stat., 768.)

The offense charged in each of the said counts, is that the petitioner did unlawfully offer for sale, and did sell, a certain adulterated article of food, to wit, milk, which was adulterated in that it consisted in whole, and in part, of a filthy and decomposed and putrid animal and vegetable substance, contrary to the statute aforesaid.

After the said information was filed, the petitioner filed a motion to quash the same, alleging nine grounds for the motion. The said motion was argued, and overruled; and thereupon, petitioner filed another motion for a bill of particulars, which motion was granted, and a bill of particulars was filed on April 21st, 1914.

The petitioner then filed a motion for a more specific bill of particulars, which motion was overruled.

On May 5, 1914, the petitioner filed a demurrer to the information, assigning the same grounds that were assigned in the said motion to quash; and thereupon, respondent overruled the said demurrer; and on said day the petitioner filed a special plea in bar, upon the ground, among others, that the court in which the respondent was presiding, to wit, the said Police Court of the District of Columbia, was without jurisdiction to try the said information, because in case of conviction the petitioner might be subjected to a punishment greater than it is lawfully within the power of said court to inflict, namely, a fine of $200 for each offense named in the information, and in default of payment, imprisonment for a period of one year for each offense, which might make an aggregate fine of $1,400, and imprisonment, in default of payment, for seven years. Said special plea was stricken out by the respondent, on May 6th, and on the same day thereafter petitioner made a motion to require the United States Attorney to elect upon which of said counts in the said information he would try the petitioner.

The last mentioned motion was overruled.

Thereupon, on said May 6, 1914, the petitioner was arraigned upon the said information, and pleaded, "not guilty." He demanded a trial thereon by jury, which was granted by the respondent; and the cause was set for the 20th day of May, 1914, to be had before him as judge aforesaid.

Said proceeding in the Police Court is entitled, "United States v. William A. Hartranft, No. 192,779."

The petitioner further alleges that under the said food and drugs act, any person who shall sell, or offer for sale, in said District, any food adulterated within the meaning of the said act, shall be guilty of a misdemeanor; and for such offense be fined not exceeding $200 for the first offense, and upon conviction, for each subsequent offense, not exceeding $300, or be imprisoned not exceeding one year, or both, in the discretion of the court; and that by Section 4, after judgment of a court in any case arising under said act, notice thereof shall be given by publication, in such manner as may be prescribed

by rules and regulations for carrying out the provisions of
19 said act; and that the rules require the Department of Agriculture, or the Secretary thereof, to publish the same and distribute the same at large throughout the United States; and that this publication to his competitors, business associates, and the public in general, would be to his great discredit and disadvantage, and be a punishment in excess of, and in addition to, the said fine and imprisonment.

Section 43 of the Code for this District provides that said Police Court shall have original jurisdiction concurrently with the Supreme Court of the District, (except where otherwise expressly in said Code provided,) of all crimes and offenses committed in said District, not capital, or otherwise infamous, and not punishable by imprisonment in the penitentiary, except libel, etc., and Section 934 provides, that when a person is sentenced for a term longer than six months, and not longer than one year, imprisonment shall be in the jail; and where the sentence is for more than one year, it shall be in the penitentiary. When the punishment for an offense may be imprisonment for more than one year, the prosecution shall be in the Supreme Court of the District; and when the maximum punishment is a fine only, or imprisonment for one year or less, the prosecution may be in the Police Court.

Section 44 provides that in all cases where the Police Court shall impose a fine, it may, in default of the payment of the fine, commit the defendant for such a term as the court thinks right and proper, not to exceed one year; and Section 227 of the Code provides that under certain circumstances, and upon compliance with certain conditions, any justice of the Court of Appeals of said District, may allow a writ of error in any causes tried in said Police Court, but is not obliged to do so; and the petitioner claims that if he should be convicted in the said Police Court, upon the said information, he would be without a right to have his conviction reviewed, and any errors of law which might have been committed therein corrected; that he would be dependent for a review upon the discretion of a justice of the Court of Appeals; and if the petitioner is convicted in said court, he claims he may be obliged to serve and undergo imprisonment, without a right or opportunity to obtain relief therefrom, save and except by pardon; whereas, if he were tried and convicted for said alleged offense in this court, or in any District Court of the United States, and should be unable to pay his fine, he would have the right and remedy of being released from imprisonment on account thereof, in accordance with Section 1042 of the Revised Statutes of the United States.

If the said Police Court has jurisdiction of said offense, under said food and drugs act, the punitive force and effect of said act in the District of Columbia will be greater than elsewhere throughout the United States, giving said Police Court greater jurisdiction and power in the administration of said act, than is or could be had and exercised by any other court, thereby making the operation of said

act unequal, and denying to persons within the District of Columbia, the equal protection with those resident in other jurisdictions.

The petitioner avers that said Police Court is not a proper court of the United States for the prosecution of said alleged offense.

20 That it could not try any person charged with a second offense against said act, because the penalty would be beyond the jurisdictional power of the court, and because the person convicted in said court of the violation of said act would have no right of appeal, which right he would have if tried in any other court; and that the joinder in said information of the seven separate and distinct offenses, makes it possible for the court, in a single judgment, to inflict a penalty beyond its jurisdiction as a court; and he claims that the said information and pretended bill of particulars was not sufficient to inform him of the nature and cause of the accusation against him.

On the presentation of this petition, a writ of certiorari was granted, and in response thereto, the respondent has returned the papers in said case; and the United States Attorney in and for the District of Columbia, as attorney for the respondent, has filed a motion to quash the said writ, because the Police Court of the District of Columbia has jurisdiction of the said cause.

The case has been argued and submitted on this motion, and briefs filed by counsel; and the court is now required to decide the matter.

At the outset, the court's attention is called to a decision of the Court of Appeals, in the case of Huyler's v. Houston, No. 31,878 Equity, reported in 42nd Washington Law Reporter, 200, in which the Court of Appeals, as it is claimed, has decided that the Police Court of this District is a proper court of the United States for the trial and punishment of offenders against the provisions of the said food and drugs act of June 30, 1906.

In that case, the question was raised as to the power of the Police Court to try the complainant for an alleged violation of the said act, the purpose of the bill being to secure an injunction against the defendant, as Secretary of Agriculture, to prevent him from making publication of judgment entered in the Police Court against the complainant.

In the bill, the complainant avers that the defendant claims the right, and avers it to be his duty, under the regulations to make publication of the fact of the fine of $200 imposed by the Police Court in case No. 185,115, entitled, "United States v. Huyler's, a body corporate," said court claiming jurisdiction of such case under Section 5, of the said act of Congress; and the complainant further avers that the said act of Congress is a lawful act, but that a true and proper construction thereof excludes the jurisdiction of the Police Court of the District of Columbia, it not being a court of the United States, within the meaning and proper interpretation of the said act of Congress; and for that reason, that the said proceeding is wholly void, and of no effect.

That the prosecution in said court is in direct violation of said

act of Congress, which provides that all prosecutions under said act shall be in the proper courts of the United States; and the complainant claims that the law means by "proper court," a constitutional court of the United States.

A rule to show cause was issued, and in answer to that rule,
21 the defendant avers that after the Police Court had heard the said case, a motion was made in arrest of judgment, on the ground that the said Police Court had no jurisdiction, and which motion was overruled by the court, and a fine imposed of $200; and thereupon, the complainant had petitioned the Court of Appeals for the allowance of a writ of error from the said judgment, basing its right to such writ upon the alleged lack of jurisdiction of the Police Court to try the case. That the Court of Appeals heard said petition, and received briefs upon the question; and after consideration, the writ of error was denied.

Wherefore, respondent claims and avers that the question of jurisdiction of the Police Court, to hear and determine such a cause, is res adjudicata, and cannot again be brought in question by this collateral proceeding. The respondent, at the time of filing the answer to the rule to show cause, filed a demurrer to the bill, in which he raises the same question as to the effect of the judgment in the Police Court, and of the refusal of the Court of Appeals to allow the writ of error on petition and argument; and avers, as reasons why the bill is defective, among others, that the Police Court of the District of Columbia is a proper court of the United States to enforce the penalties provided for in the act of June 30, 1906, known as the food and drugs act; and that the said Police Court had jurisdiction to try the said case of the United States v. Huyler's.

This court discharged the said rule to show cause, and sustained the demurrer to the bill; and the bill was thereupon dismissed with costs; and the complainant appealed to the Court of Appeals.

In the assignments of error are the following:

1. The court erred in holding that the Police Court is a proper court of the United States, within the meaning of the pure food and drugs act of June 30, 1906.

2. The court erred in holding that the Police Court of the District of Columbia is a constitutional court of the United States, which court is intended to be named the proper court of the United States by the said food and drugs act of June 30, 1906.

It will therefore be seen by the record in this equity suit, that the exact question of jurisdiction of the Police Court to try persons charged with violating the provisions of the said food and drugs act, was clearly and distinctly raised, and the Court of Appeals, in considering the case, fairly decided that question, when it affirmed the judgment of this court.

It therefore seems to me that this court is bound by the said decision to recognize the said Police Court as a proper court to try a charge, or charges, for the violation of the pure food and drugs act.

Being bound by the said decision of said appellate court, on the general question of jurisdiction, is there anything in the present

case that would seem to warrant this court in distinguishing it from the Hryler's case, so as to say that the Police Court had exceeded its jurisdiction in this case, notwithstanding it had jurisdiction in the Huyler's case?

The claim is made by counsel for the petitioner, that be-
22 cause the information in the present case is one containing seven counts, each count being a separate violation of the said act, that on the face of the papers that court cannot proceed with a trial, because it might be that the jury would find the complainant guilty on all seven counts, and the court might impose a fine of $200 under each count, and in default of payment, might sentence the complainant to jail for one year under each count; and that such imprisonment, if adjudged, would be beyond the jurisdiction of that court.

Because the information consists of seven separate counts, seven alleged independent violations of the act, does not, as it seems to me, deprive the court of its jurisdiction to try the case. It may be that conviction would be had only on one count, or, if conviction was had under more than one count, it may be that the court, in its discretion, would only sentence the plaintiff to pay a fine under one count, and in default thereof, to be imprisoned for only one year.

Section 2 of the said act provides what the penalties are to be for its violation. The party convicted of such violation shall be guilty of a misdemeanor, and for such offense pay a fine not exceeding $200 for the first offense, and not exceeding $300 for each subsequent offense, or be imprisoned not exceeding one year; or both, in the discretion of the court.

It is argued that the Police Court, by reason of the organic act creating it, and the provisions of law since passed, cannot sentence a party to imprisonment for more than one year; and that because the information is filed, charging seven distinct violations of the law, that the court is deprived of jurisdiction to try either one of the said counts, and is deprived of jurisdiction to fine or imprison the offender so charged.

This does not seem to me logical, for it would seem to anticipate a conviction on more than one count, and an effort on the part of the court to go beyond its jurisdiction in the assessment of fines and imprisonment.

If seven different informations were filed, instead of one information with seven counts, it seems to me that the exact question would be raised that is raised now; and whether there is more than one paper in which the offenses are charged, or whether there is one paper with seven distinct paragraphs, can really make no difference in point of law.

Feeling bound by the decision of the said Court of Appeals, that the Police Court has jurisdiction to try offenders who may be charged with violating the provisions of the pure food and drugs act; and being unable to see anything in the present case that takes it out from the effect of that decision, I am disposed to grant the motion to quash the writ of certiorari; and such will be the order of the court.

JOB BARNARD, *Justice.*

23 Supreme Court of the District of Columbia.

WEDNESDAY, June 3, 1914.

Session resumed pursuant to adjournment, Mr. Justice Barnard presiding.

* * * * * * *

This cause coming on to be heard on the petition, the Writ of Certiorari issued thereon, the return to the said writ, and the Motion of the Respondent to quash the said writ, and having been heretofore argued by Counsel and considered by the Court, it is this 3d day of June, 1914, adjudged and ordered that the said motion be, and the same hereby is, granted, that the said writ be, and it hereby is, quashed, that the said petition be, and it hereby is, dismissed, at the costs of petitioner, and that the record accompanying the said return be and it hereby is, remanded to the Police Court of the District of Columbia whence it came, and the petitioner being now in open Court by his Attorney notes an appeal to the Court of Appeals of the District of Columbia, and the penalty of the bond on said appeal, to act as a Supersedeas, is hereby fixed in the sum of Five hundred dollars ($500.).

Memorandum.

June 3, 1914.—Appeal bond approved and filed.

Assignments of Error.

Filed June 18, 1914.

* * * * * * *

The court erred as follows:

1. Holding that the Police Court of the District of Columbia is a proper court of the United States, within the meaning of the Food and Drugs Act, so-called, of the Congress of the United States of June 30, 1906, in which a prosecution for violation of the provisions of the said Act may be had.

2. In not holding that the said Police Court is not such proper court, for the reasons set forth in the petition herein.

3. In not holding that the said Police Court has not jurisdiction to try the information in the petition in this cause set forth, for that the said information containing six counts the petitioner, upon conviction thereon, may be subjected by the judgment of the said Police Court to a greater punishment than it is lawfully within its power to inflict, namely, the punishment of seven separate and distinct fines in the amount of Two hundred Dollars ($200) each, and, in default of the payment of the same, seven separate and distinct commitments to imprisonment for the period of one year each, or a pun-

ishment in all of fines to the amount of Fourteen hundred
24 Dollars ($1,400), and, in default of the payments thereof, imprisonment for a period of seven (7) years in the aggregate.

4. In not holding that the said Police Court has not jurisdiction to try the said information, for that, if the petitioner be convicted thereon, he will be subjected, in addition to the penalty of fine or imprisonment in default of payment thereof, to the penalty of a publication of the said judgment, as provided by the said Food and Drugs Act, so-called.

5. In not holding that, if the said Police Court has jurisdiction to try the said information, the same should have been filed and prosecuted in the name and on behalf of the District of Columbia, instead of in the name and on behalf of the United States of America.

6. In not overruling the motion to quash the writ of certiorari issued herein.

7. In quashing the said writ of certiorari.

HENRY E. DAVIS,
MATTHEW E. O'BRIEN,
Attorneys for Petitioner, Appellant.

Appellant's Designation of Record.

Filed June 18, 1914.

* * * * * * *

Comes now the petitioner, by his attorneys, and designates the following for the transcript of record on the appeal in the above entitled cause.

1. The petition for writ of certiorari.
2. The writ of certiorari.
3. The motion to quash the writ of certiorari.
4. The order and judgment of the court granting the foregoing motion to quash the writ of certiorari.
5. Memorandum of the bond on appeal.
6. The assignments of error.
7. This memorandum.

HENRY E. DAVIS,
MATTHEW E. O'BRIEN,
Attorneys for Petitioner, Appellant.

Service of a copy of the above assignment of error is hereby acknowledged to have been made this 18th day of June, A. D. 1914.

CLARENCE R. WILSON,
U. S. Att'y.

By JAMES A. COBB,
Special Ass't U. S. Att'y.

25 *Appellee's Designation of Record.*

Filed June 19, 1914.

* * * * * * *

Comes now the respondent, by his attorneys, and designates the following addition for the transcript of record on the appeal in the above entitled cause.

1. Return to the writ of certiorari.

CLARENCE R. WILSON,
Attorney of the United States in and for the District of Columbia.
WALTER BRUCE HOWE,
JAMES A. COBB,
Ass't United States Attorneys.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 46, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copies of which are made part of this transcript, in cause No. 56887 at Law, wherein William A. Hartranft is Plaintiff and Alexander R. Mullowny, Judge of the Police Court of the District of Columbia, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 2nd day of July, 1914.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2725. William A. Hartranft, appellant, vs. Alexander R. Mullowny, Judge of the Police Court of the District of Columbia. Court of Appeals, District of Columbia. Filed Jul- 20, 1914. Henry W. Hodges, Clerk.

26 MONDAY, December 7th, A. D. 1914.

No. 2725.

WILLIAM A. HARTRANFT, Appellant,
vs.
ALEXANDER R. MULLOWNEY, Judge of the Police Court of the District of Columbia.

The argument in the above entitled cause was commenced by Mr. M. E. O'Brien, attorney for the appellant, and was continued by Messrs. J. A. Cobb and J. E. Laskey, attorneys for the appellee, and was concluded by Mr. Henry E. Davis, attorney for the appellant.

27 Court of Appeals of the District of Columbia.

No. 2725.

WILLIAM A. HARTRANFT, Appellant,
v.
ALEXANDER R. MULLOWNY, Judge of the Police Court of the District of Columbia.

Opinion.

Mr. Justice ROBB delivered the opinion of the Court:

Appeal from a judgment in the Supreme Court of the District quashing and dismissing a petition for certiorari challenging appellee's jurisdiction to try appellant upon an information charging him with a first offense of selling adulterated milk in violation of the act of June 30, 1906, (34 Stat., 768).

Under said act it is made a misdemeanor for any person to sell or offer for sale in the District of Columbia or the territories of the United States adulterated food, and the punishment for a first offense is a fine not exceeding $200, and for each subsequent offense a fine not exceeding $300 or imprisonment not exceeding one year, or both, at the discretion of the court. The act provides for the examination of specimens of food and drugs to be made by the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of that Bureau, for the purpose of determining whether such articles are adulterated or misbranded within the meaning of the act. If it appears from such examination that the specimen examined is adulterated or misbranded it is made the duty of the Secretary of Agriculture to cause notice to be given to the party from whom the sample was obtained and to accord that party opportunity to be heard. If it then appears that any of the provisions of the act have been violated the Secretary is required at once to certify the facts "to the proper United States District Attorney," etc., whose duty it is "to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States for the enforce-

ment of the penalties prescribed in the act. It is further provided that "after judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid;" that is, the rules and regulations of the Department of Agriculture.

In Huyler's v. Houston, 41 App. D. C., 452, where there had been a conviction in the Police Court of the District of a first offense under said act of 1906, it was ruled that while that court is not a court of the United States under the Federal Constitution, it nevertheless is "a proper court of the United States" in the sense in which that phrase is used in the act. Two grounds in support of the contention that the Police Court is not such a "proper court of the United States" are now presented by the appellant which, it is contended, were not brought to the attention of the court in the Huyler's case. We will briefly consider them. It is said that should the appellant be convicted in the Police Court and fined, in the event of his inability to pay that fine, he will be compelled to undergo imprisonment without right or opportunity of relief therefrom except by pardon, whereas, should he be tried and convicted in the Supreme Court of the District or any District Court of the United States, and be unable to pay such fine, he would have the right and remedy of being released from imprisonment in accordance with the provisions of Section 1042 of the Revised Statutes of the United States. That section permits a poor convict sentenced by any court of the United States to pay a fine or a fine and costs, whether with or without imprisonment, who has been confined in prison thirty days solely for the nonpayment of such fine or fine and costs, to be discharged after hearing before a United States Commissioner and upon taking the prescribed oath.

In United States v. Mills, 11 App. D. C., 500, it was pointed out that under the general Criminal Code of the United States there is no statutory provision for the enforcement of a fine when that is the penalty imposed or the only part of the penalty that remains to be performed, and hence that the enforcement can only be by imprisonment until the fine is paid; that this necessarily leaves the duration of the time of detention for that purpose indefinite. Were it not therefore for the provisions of section 1042 of the Revised Statutes, no relief could be afforded poor convicts. The court further pointed out that under the act of July 23, 1892 (27 Stat., 262), now incorporated into Section 44 of our Code, provision is made for the enforcement of fines imposed by the Police Court as follows: "In all cases where the said (Police) Court shall impose a fine, it may, in default of the fine imposed, commit the defendant for such time as the court thinks right and proper, not to exceed one year." It is apparent, therefore, that the special circumstances of a given case may be taken into consideration by the Police Court, and hence that the supposed difference in the degree of punishment in the Supreme Court and the Police Court really does not exist.

It is next insisted that the penalty for a violation even by first offense of any provision of said act of 1906 is not limited to fine because of the provision requiring the Secretary to give notice by

publication after judgment of the court. In support of this contention two cases are relied upon—Klyman v. Com., 97 Ky., 484, and Cheek v. Com., 87 Ky., 42. In the former, the statute prescribed the penalty of a fine or imprisonment for unlawfully permitting a minor to play pool and the statute provided that the offender, in addition, should forfeit the right and privilege of again keeping a pool table. It was held that as the effect of the judgment was
28 to deprive the accused of his right and privilege of again keeping pool tables, the penalty imposed was beyond the jurisdiction of the court. In the latter case, the statute made disfranchisement a consequence of conviction of bribery at an election. It was held that this provision was a part of the penalty and hence that the city court had no jurisdiction of the offense. The distinction between these cases and the one before us is obvious. Here no additional penalty is imposed. The Secretary is merely required to publish the findings of the court. A court reporter, where there is one, does the same.

It is further insisted that because the information is in seven counts, charging the defendant with as many separate and distinct offenses, the aggregate imprisonment in default of the payment of the fine may be more than one year and, if so, must be in the penitentiary and hence that the Police Court has no jurisdiction. This contention is based upon the provisions of Section 934 of the Code, which provides that "when any person is sentenced for a term longer than one year, such imprisonment shall be in the jail, and where the sentence is imprisonment for more than one year, it shall be in the penitentiary. Cumulative sentences aggregating more than one year shall be deemed one sentence for the purposes of the foregoing provision." This section, received the consideration of the court in Harris v. Lang, 27 App. D. C., 84, and it was ruled that the provision relating to cumulative sentences "has no reference to a sentence to pay a pecuniary fine, followed by imprisonment in default of payment, but relates only to cases in which the punishment is to be imprisonment." Moreover, as previously pointed out, section 44 of the Code expressly limits the authority of the Police Court to a commitment of one year in default of payment of the fine imposed. We must assume the court will keep within its jurisdiction. United States v. Pridgeon, 153 U. S., 48.

Judgment affirmed with costs.

Affirmed.

29 January Term, 1915.

MONDAY, January 4th, A. D. 1915.

No. 2725.

WILLIAM A. HARTRANFT, Appellant,
vs.
ALEXANDER R. MULLOWNEY, Judge of the Police Court of the District of Columbia.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE ROBB,
January 4, 1915.

30 Court of Appeals of the District of Columbia.

No. 2725.

WILLIAM A. HARTRANFT, Appellant,
vs.
ALEXANDER R. MULLOWNY, Judge of the Police Court of the District of Columbia.

Comes now the appellant, by his attorneys, and prays the court to allow a writ of error to the Supreme Court of the United States in the above entitled cause, upon the following grounds:

1. In the said cause the jurisdiction of the trial court, to wit, the Police Court of the District of Columbia, is in issue.
2. In the said cause the construction of a law of the United States, to wit, the Food and Drugs Act so-called of June 30, 1906, is drawn in question by the appellant, defendant below.

Respectfully submitted,

HENRY E. DAVIS,
MATTHEW E. O'BRIEN,
Attorneys for Appellant, Petitioner.

(Endorsed:) No. 2725. William A. Hartranft, Appellant, vs. Alexander R. Mullowny, &c. Motion for allowance of writ of error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jan. 21, 1915. Henry W. Hodges, Clerk.

[Endorsed:] No. 2725. William A. Hartranft vs. Alexander R. Mullowny, Judge of the Police Court of the District of Columbia. Petition for writ of error. Copy. Filed Jan. 21, 1915. H. W. Hodges, clerk.

31 MONDAY, February 1st, A. D. 1915.

No. 2725.

WILLIAM A. HARTRANFT, Appellant,
vs.
ALEXANDER R. MULLOWNEY, Judge of the Police Court of the District of Columbia.

On consideration of the motion for the allowance of a writ of error to remove the above entitled cause to the Supreme Court of the United States, it is by the Court this day ordered that said motion be, and the same is hereby, granted. And it is further ordered that the bond for costs on said writ of error be, and the same is hereby, fixed at the sum of three hundred dollars.

32 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between William A. Hartranft, Appellant, and Alexander R. Mullowney, Judge of the Police Court of the District of Columbia, Appellee a manifest error hath happened, to the great damage of the said Appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 1st day of February, in the year of our Lord one thousand nine hundred and fifteen.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by——
——.

33 *(Bond on Writ of Error.)*

Know all Men by these Presents, That we, William A. Hartranft, as principal, and Wm. W. Stewart, as surety, are held and firmly bound unto Alexander R. Mullowney a Judge of the Police Court of the District of Columbia in the full and just sum of Three hundred dollars to be paid to the said Alexander R. Mullowney Judge of the Police Court of the District of Columbia certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 2nd day of February, in the year of our Lord one thousand nine hundred and fifteen.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between said William A. Hartranft and said Alexander R. Mullowney Judge of the Police Court of the District of Columbia a judgment was rendered against the said William A. Hartranft and the said William A. Hartranft having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Alexander R. Mullowney Judge of the Police Court of the District of Columbia citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said William A. Hartranft shall prosecute said writ of error to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM A. HARTRANFT. [SEAL.]
WILLIAM W. STEWART. [SEAL.]

Sealed and delivered in the presence of—

MATTHEW E. O'BRIEN.
W. H. REED.

Approved by—

SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 2725. William A. Hartranft, Appellant, vs. Alexander R. Mullowney, Judge of the Police Court of the District of Columbia. Bond for costs on writ of error. Court of Appeals, District of Columbia. Filed Feb. 3, 1915. Henry W. Hodges, Clerk.

34 UNITED STATES OF AMERICA, *ss:*

To Alexander R. Mullowney, Judge of the Police Court of the District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein William A. Hartranft plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 3d day of February, in the year of our Lord one thousand nine hundred and fifteen.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 3rd day of February, A. D. 1915.
JOHN E. LASKEY,
U. S. Att'y, D. C.

[Endorsed:] Court of Appeals, District of Columbia. Filed Feb. 3, 1915. Henry W. Hodges, Clerk.

35 In the Court of Appeals of the District of Columbia.

No. 2725.

WILLIAM A. HARTRANFT, Appellant,
vs.
ALEXANDER R. MULLOWNEY, Judge of the Police Court of the District of Columbia.

Assignments of Error on the Writ of Error from the Supreme Court of the United States Sued Out Herein.

The said Court of Appeals of the District of Columbia erred as follows:

1. In holding that the Police Court of the District of Columbia is a proper court of the United States, within the meaning of the Food and Drugs Act, so-called, of the Congress of the United States of June 30, 1906, in which a prosecution for violation of the provisions of the said Act may be had.

2. In not holding that the said Police Court is not such proper court, for the reasons set forth in the petition herein, namely: (1) In and by the said Food and Drugs Act, so-called, it is enacted and provided that violations of the provisions thereof shall be "prosecuted

in the proper courts of the United States," and the said Police Court is not such a Court, because (*a*) if any person prosecuted therein for a first offense against the said Act should be convicted and fined, and unable to pay the fine imposed, he would be subject to possible imprisonment for one year, whereas, no such alternative penalty could be inflicted upon a person so prosecuted and convicted in any other court; and (*b*) the said Police Court could not try any person charged with a second offense against said Act, for that
36 the penalty for such second offense is beyond the jurisdictional power of the said Court to impose. (2) A person prosecuted in the said Police Court for any violation of the said Act would have no right of appeal from his conviction, or writ of error in respect thereof, whereas such right, as of course, would belong to any person so prosecuted in any other court.

3. In not holding that the said Police Court has not jurisdiction to try the information in the petition in this cause set forth, for that the said information containing six counts, the petitioner, upon conviction thereon, may be subjected by the judgment of the said Police Court to a greater punishment than it is lawfully within its power to inflict, namely, the punishment of seven separate and distinct fines in the amount of Two hundred Dollars ($200) each, and, in default of the payment of the same, seven separate and distinct commitments to imprisonment for the period of one year each, or a punishment in all of fines to the amount of Fourteen hundred Dollars ($1400), and, in default of the payments thereof, imprisonment for a period of seven (7) years in the aggregate.

4. In not holding that the said Police Court has not jurisdiction to try the said information, for that, if the petitioner be convicted thereon, he will be subjected, in addition to the penalty of fine or imprisonment in default of payment thereof, to the penalty of a publication of the said judgment, as provided by the said Food and Drugs Act, so-called.

5. In not holding that, if the said Police Court has jurisdiction to try the said information, the same should have been filed and prosecuted in the name and on behalf of the District of Columbia, instead of in the name and on behalf of the United States of America.
37 6. In affirming the judgment of the Supreme Court of the District of Columbia quashing the writ of certiorari issued herein.

7. In not reversing the judgment of the Supreme Court of the District of Columbia herein.

HENRY E. DAVIS,
MATTHEW E. O'BRIEN.
Attorneys for Appellant, Now Plaintiff in Error.

(Endorsed:) No. 2725. William A. Hartranft, Appellant, vs. Alexander R. Mullowney, &c. Assignments of Error. Court of Appeals, District of Columbia. Filed Feb. 25, 1915. Henry W. Hodges, Clerk.

38 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the Dis trict of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 37, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of William A. Hartranft, Appellant, vs. Alexander R. Mullowny, Judge of the Police Court of the District of Columbia, No. 2725, January Term, 1915, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 26th day of February A. D. 1915.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 2/26/15. H. W. H., Clerk.]

Endorsed on cover: File No. 24,599. District of Columbia Court of Appeals. Term No. 381. William A. Hartranft, plaintiff in error, vs. Alexander R. Mullowny, judge of the police court of the District of Columbia. Filed March 3d, 1915. File No. 24,599.

SUBJECT INDEX.

STATUTES CITED.

AUTHORITIES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 855.

WILLIAM A. HARTRANFT, PLAINTIFF IN ERROR.

vs.

ALEXANDER R. MULLOWNY, JUDGE OF THE POLICE COURT OF THE DISTRICT OF COLUMBIA.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Brief in Opposition to the Motion to Dismiss or Affirm.

The motion to dismiss or affirm, in this cause, is prematurely made and should not be considered at this time, for the reason that neither the record nor any part thereof has been printed, to enable the court to act intelligently upon the motion; and it is apparent from the brief filed in support of the motion, that the questions involved are not adequately stated by counsel making the motion.

The application for a writ of error was made to the Court of Appeals of the District of Columbia in open court and the writ was unanimously granted by that

court, on two grounds; namely, the lack of jurisdiction of the trial court, and the construction of a general law of the United States. The right to the writ of error on each of these grounds is given in section 250 of the Judicial Code.

This is not a case arising under the criminal laws of the United States, but a suit at law to prevent the defendant in error, a judge of an inferior court of limited jurisdiction, from attempting to administer and execute a general statute of the United States, which, in its provisions, is both civil and criminal.

That this is a final judgment between the parties, there can be no doubt, since the judgment of the Court of Appeals of the District of Columbia affirms that of the Supreme Court of the District of Columbia, and directs a judgment for costs against the plaintiff in error, leaving nothing further to be done in the cause, except the issuing of execution upon the judgment so rendered against the plaintiff in error.

The brief in support of the motion to affirm or dismiss is divided into three parts; the first under the heading, "The Writ of Error should be Dismissed Because This is a Case Arising Under the Criminal Laws;" the second under the heading, "The Writ of Error Should Be Dismissed Because the Decision Appealed From Is Not a Final Judgment;" and the third under the heading, "The Judgment Should Be Affirmed, Because the Decision of the Court of Appeals Is Obviously Correct."

These contentions will be taken up in the order indicated.

I.

As to the first, that this is a case arising under the criminal laws, it is only necessary to read the title of the cause to see that such is not the case. This is the suit

of Hartranft *vs.* Mullowny, and can not be said to arise under the criminal laws, any more than a habeas corpus for the release of a person imprisoned under a void judgment by a court having no jurisdiction can be said to be a case arising under those laws.

In dealing with this question, the Court of Appeals of the District of Columbia said:

> "The Supreme Court of the District of Columbia has general common-law jurisdiction of civil and criminal matters. . . . There is only one court of general common-law jurisdiction within the District of Columbia, which is the Supreme Court. . . .
>
> "The mere fact that the statutory right is afforded a litigant in the Juvenile Court to come to this court by writ of error does not exclude all other remedies. Should the Juvenile Court imprison a litigant in the enforcement of a void judgment, it would hardly be contended that he could not collaterally attack that judgment by suing out a writ of habeas corpus in the Supreme Court of the District of Columbia. While it is true that certiorari will not lie where there is concurrent jurisdiction, here there is no jurisdiction whatever in the Juvenile Court. It does not necessarily follow that because the appellee had the right of appeal to this court, he can be deprived of the right to the writ of certiorari. Where the court has proceeded without jurisdiction, the writ can be substituted for an appeal.
>
> "As to the power of the Supreme Court to direct a writ of certiorari to the Juvenile Court, there can be no doubt. The Supreme Court being the only court in the District with general common-law jurisdiction, it is analogous to the Court of King's Bench, having supervisory control over all inferior tribunals within the territorial limits of its jurisdiction. When the Juvenile Court usurps the jurisdiction vested in the Supreme Court, some adequate means must be

afforded to enable the Supreme Court to assume jurisdiction of the case."

U. S. vs. West, 34 Appeals, D. C., 12.

And this court has said:

"Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, *or of some collateral matter arising therein*, a party who has objected to the jurisdiction at the outset, and has no other remedy, is entitled to a writ of prohibition as a matter of right."

Re Rice, 155 U. S., 396, 402.

It is most respectfully submitted that a suit brought by a citizen against a judge claiming jurisdiction of a cause, when no such jurisdiction exists, is a suit at law between the citizen and the judge and not, in any sense, either a criminal case, or one arising under the criminal laws.

It is the contention of the plaintiff in error that the Supreme Court of the District of Columbia is the only court having jurisdiction to administer the Pure Food Law, so called; and by issuing it's writ of certiorari, the Supreme Court of the District of Columbia was attempting to assume that jurisdiction, and to prevent the Police Court judge from usurping that jurisdiction; and the judge of the Supreme Court of the District of Columbia, who decided the case, said in a written opinion that he did so because he was bound by a previous decision of the Court of Appeals in the case of Huyler's vs. Houston, wherein the Court of Appeals had decided adversely to the contention of the plaintiff in error, and not because the Supreme Court of the District of Columbia was willing to permit the defendant in error to usurp its power.

This suit was started to prevent the defendant in error from entertaining a prosecution of the plaintiff in error, in the Police Court of the District of Columbia, under an act of the Congress of the United States, of June 30, 1906, entitled,

> "An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded, or poisonous or deleterious, foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," (34 Stats. at L., 768),

commonly called and known as "The Food and Drugs Act, June 30, 1906."

By its terms, the above named act provides, among other things, that notice of judgments shall be given by publication in such manner as may be prescribed by rules and regulations promulgated for the carrying out of the provisions of said act, and the executive authority acting under the act has promulgated the following regulation:

> "(*a*) When a judgment of the court shall have been rendered there may be a publication of the findings of the examiner or analyst, together with the findings of the court.
>
> "(*b*) This publication may be made in the form of circulars, notices, or bulletins, as the Secretary of Agriculture may direct, not less than thirty days after judgment.
>
> "(*c*) If an appeal be taken from the judgment of the court before such publication, notice of the appeal shall accompany the publication."

The said Food and Drugs Act, so called, also provides for the libeling and condemnation of foods used in violation of its provisions. It will therefore be seen that the act in question is both civil and criminal, and that to attack a judge of an inferior court of limited jurisdiction, who claims by virtue of the words, "proper courts of the United States" used in the act, to designate the courts

having jurisdiction to administer the act in question, is not a case arising under the criminal laws.

II.

In answer to the second contention that, "The Writ of Error Should Be Dismissed Because the Decision Appealed From Is Not a Final Judgment," counsel for the plaintiff in error most respectfully submit that counsel for the defendant in error has confused the case under consideration with the original case filed in the Police Court. We are willing to have the question of whether or not this is a final judgment, tested by the rule laid down by this court as follows:

> The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeal and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered.
>
> *Macfarland* v. *Brown*, 187 U. S., 239, 246.

In the case at bar, the judgment of the Court of Appeals, affirming the judgment of the Supreme Court of the District of Columbia, and assessing the costs against the plaintiff in error and in favor of the defendant in error, leaves nothing for the Supreme Court of the District of Columbia to do in respect to the parties to that suit, but to enter the judgment and issue execution against the plaintiff in error for the costs.

III.

The third claim, "The Judgment Should Be Affirmed Because the Decision of the Court of Appeals Is

Obviously Correct," brings us to a consideration of the case on its merits, and presents the contention that the Police Court is not a "proper court of the United States" within the meaning of the Food and Drugs Act, and that a judge of said court can not administer the provisions of said act.

The following is offered in support of this contention of the plaintiff in error:

1. The Police Court of the District of Columbia is not a "proper court of the United States," as aforesaid.

(*a*) The Police Court as constituted by law.

The character of the Police Court, in one respect or another, has been the subject of repeated consideration by the Court of Appeals of the District of Columbia and this court, but, for the purposes of the present case, it is unnecessary to review the expressions and decisions of these courts on the subject. It is not of present concern or interest whether the Police Court be or be not a court of the United States in the Constitutional sense, or in the category of courts of the United States in general: the proposition now submitted for consideration is whether, within the meaning of the Food and Drugs Act, the Police Court is one of the "proper courts of the United States" mentioned in section 5 of the act, which section is as follows:

> "That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this act, or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia, shall present satisfactory evidence of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided."

The jurisdiction of the Police Court is thus prescribed:

"The said court shall have original jurisdiction concurrently with the Supreme Court of the District, except where otherwise expressly herein provided, of all crimes and offenses committed in the said District not capital or otherwise infamous and not punishable by imprisonment in the penitentiary, except libel, conspiracy, and violation of the post-office and pension laws of the United States, and also of all offenses against municipal ordinances and regulations in force in the District of Columbia. The said court shall also have power to examine and commit or hold to bail, either for trial or further examination, in all cases, whether cognizable therein or in the Supreme Court of the District."

Code, D. C., sec. 43.

"In all cases where the said court shall impose a fine it may, in default of the payment of the fine imposed, commit the defendant for such term as the court thinks right and proper, not to exceed one year."

Code, D. C., sec. 44.

The provisions of law respecting prosecutions of offenses in the District of Columbia are as follows:

"That prosecutions in the Police Court shall be on information by the proper prosecuting officer."

Code, D. C., sec. 44.

"Prosecutions for violations of all police or municipal ordinances or regulations and for violation of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Columbia and by the Corporation Counsel or his assistants. All other criminal prosecutions shall be conducted in the name of

the United States and by the attorney of the United States for the District of Columbia or his assistants."

Code, D. C., sec. 932.

The provisions respecting the place of imprisonment of offenders convicted in the District of Columbia are as follows:

"When any person shall be sentenced to imprisonment for a term not exceeding six months the court may direct that such imprisonment shall be either in the workhouse or in the jail. When any person is sentenced for a term longer than six months and not longer than one year such imprisonment shall be in the jail, and where the sentence is imprisonment for more than one year it shall be in the penitentiary. Cumulative sentences aggregating more than one year shall be deemed one sentence for the purposes of the foregoing provision. When the punishment of an offense may be imprisonment for more than one year the prosecution shall be in the Supreme Court of the District. When the maximum punishment is a fine only or imprisonment for one year or less the prosecution may be in the Police Court."

Code, D. C., sec. 934.

And, respecting appeals from the Police Court, the provisions of law presently material are as follows:

"If, upon the trial of any cause in the Police Court, an exception be taken . . . the same shall be reduced to writing and stated in a bill of exceptions . . .; and, if, upon presentation to any justice of the Court of Appeals of the District of Columbia of a petition . . . setting forth the matter or matters so excepted to, such justice shall be of opinion that the same ought to be reviewed, he may allow a writ of error in the cause."

Code, D. C., 227.

And Section 1042, R. S. U. S., decided by the Court of Appeals of the District of Columbia, in U. S. vs. Mills, 11 App. D. C., 500, not to be applicable to the Police Court, is as follows:

> "When a poor convict, sentenced by any court of the United States to pay a fine, or fine and cost, whether with or without imprisonment, has been confined in prison thirty days, solely for the non-payment of such fine, or fine and cost, he may make application in writing to any commissioner of the United States court in the district where he is imprisoned, setting forth his inability to pay such fine, or fine and cost, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter, and if on examination it shall appear to him that such convict is unable to pay such fine, or fine and cost, and that he has not any property exceeding twenty dollars in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: 'I do solemnly swear that I have not any property, real or personal, to the amount of twenty dollars, except such as is by law exempt from being taken on civil precept for debt by the laws of (State where oath is administered), and that I have no property in any way conveyed or concealed, or in any way disposed of, for my future use or benefit. So help me God.' And thereupon such convict shall be discharged, the commissioner giving to the jailer or keeper of the jail a certificate setting forth the facts."
>
> R. S. U. S., sec. 1042.

These respective provisions of the Food and Drugs Act, of the Code of Law for the District of Columbia, and of the Revised Statutes of the United States, clearly establish the following propositions:

(1) The jurisdiction of the Police Court of the District of Columbia is limited to cases involving punishment by fine only, or imprisonment not exceeding one year, and does not extend to any case involving punishment by fine and imprisonment, or by fine and a penalty additional to, and in excess of the fine.

(2) Prosecutions in the Police Court of the District of Columbia for offenses under penal statutes in the nature of police regulations, and involving punishment by fine only must, and can only, be conducted in the name of the District of Columbia, and by its counsel, whereas the Food and Drugs Act, by section 5 above quoted, contemplates and provides for prosecution for any violation of the act in the name, and by an attorney, of the United States only.

(3) One accused and convicted in the Police Court of the District of Columbia of such an offense as that under consideration has no right of appeal, as of course, from his conviction, whereas one so accused and convicted in any other court has such right, and,

(4) One convicted and fined in the Police Court of the District of Columbia, and sentenced to imprisonment in default of payment of the fine, has not the right and remedy of being released from such imprisonment in accordance with the provisions in that behalf of section 1042 of the Revised Statutes of the United States, whereas one so convicted and imprisoned by the sentence of any other court of the United States has such right and remedy.

So plainly incontrovertible do these propositions seem to be that discussion of them might well be pre-

termitted, but, out of abundant caution, the following suggestions are presented:

(1) The Police Court, being a court of inferior and limited jurisdiction, can not, either by implication or consent, claim or acquire any other or further jurisdiction; and the manner of proceeding therein, being plainly prescribed by law, can not be altered or varied in any manner or upon any pretext.

And very clearly the penalty of a violation, even by first offense, of any provision of the Food and Drugs Act is not limited to fine, but involves the grave consequence of official public proclamation and stigmatization of the offender, in accordance with the following provision of section 4 of the act:

> "After judgment of the court notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid,"

meaning the rules and regulations by section 3 of the act prescribed.

The application and execution of this provision of the Food and Drugs Act were brought to the attention of the Court of Appeals of the District of Columbia in the case of Huyler's *vs.* Houston, 41 App. D. C., 452, further considered hereinafter; and the departmental regulation respecting publication, prescribed as aforesaid, is as follows:

> "(*a*) When a judgment of the court shall have been rendered there may be a publication of the findings of the examiner or analyst, together with the findings of the court.
>
> "(*b*) This publication may be made in the form of circulars, notices, or bulletins, as the Secretary of Agriculture may direct, not less than thirty days after judgment.
>
> "(*c*) If an appeal be taken from the judgment of the court before such publication, notice of the appeal shall accompany the publication."

That the statute does not provide that the judgment of the court shall direct the contemplated publication is immaterial to the question whether the publication is part of the penalty following conviction; the fact that such publication is provided by the statute to follow conviction of itself makes the publication part of the penalty.

Where, in addition to a penalty prescribed to be imposed by a court for a given offense, the act defining the offense and prescribing its penalty provides that the conviction shall be followed by forfeiture of a right or privilege, such forfeiture, though not included in the judgment or sentence of the court, is as much part of the penalty as though it were so included.

Thus, where, in prescribing the penalty of a fine or imprisonment for unlawfully permitting a minor to play pool, the statute provided that the offender should, in addition, forfeit the right and privilege of again keeping a pool table, it was held that the incident of forfeiture must be regarded as part of the punishment in determining the question of the jurisdiction of the court; and it was, accordingly, held that, as the jurisdiction of the court was confined to a prescribed maximum penalty of fine or imprisonment, it was without jurisdiction to try such a case.

Klyman *vs.* Comm., 97 Ky., 484.

In this case the judgment or sentence of the court did not adjudicate or declare the forfeiture, but the court, deeming that immaterial, said (p. 486):

> "As the effect of the judgment was to deprive the accused of his right and privilege of again keeping pool tables, the penalty *imposed by the statute* was beyond the jurisdiction of the court."

To the same effect are the cases of Cheek *vs.* Comm.,

87 Ky., 42, and Johnson *vs.* Comm., 90 Ky., 53, in the former of which the court (p. 46) characterized the penalty attached in addition to the punishment imposed as "a badge of disgrace and infamy."

And under a statute making disfranchisement, etc., a consequence of conviction of bribery at an election the court, dealing with the question of the effect of this upon the jurisdiction of the trial court, said:

> "The question is not simply whether the punishment imposed exceeds that to which the city court is restricted by the charter, but whether the case is one for which a greater punishment is *provided by the general law.* What, then, is the extent of the punishment provided by the general law?
>
> "It not only denounces a fine of $500 but goes further and provides that the offender, after conviction, shall be deemed infamous, and be forever thereafter disqualified from exercising the right of suffrage, and from holding any office of honor, trust, or profit. And this disfranchisement, disqualification, and infamy *follow* a judgment of conviction and *attach* to it as its *legal* consequences and effects.
>
> "We are, therefore, of opinion that said city court had no jurisdiction of the offense with which the appellants were charged."
>
> Flynn et al *vs.* Comm., 2 Bush (Ky.), 590, 593-4.

The Court of Appeals of the District of Columbia has aptly, tersely, and comprehensively said:

> "It is well settled that under a statute authorizing a justice of the peace, police judge, or other magistrate with limited jurisdiction to fine or imprison, he has no jurisdiction to try a criminal case punishable by fine and imprisonment. If the offense be one the maximum penalty or

punishment of which exceeds the power of his court to impose, he is without jurisdiction."

D. C. *vs.* Simpson, 40 App. D. C., 498.

Inasmuch as the penalty, for even a first offense, under the provision of the Food and Drugs Act in question has attached to it as a legal consequence and effect the publication prescribed, which publication is to follow, even though there be pending an appeal in which the conviction may be reversed, it would seem too plain for argument that this additional "penalty imposed by the statute," or, as it is otherwise said "provided by the general law," and affixing to the accused "a badge of disgrace," is such as to oust the Police Court of jurisdiction in the premises.

(2) That the Food and Drugs Act does not contemplate the Police Court of the District of Columbia as one of the "proper courts of the United States" mentioned therein, is evident from the fact that, whereas prosecutions in that court for offenses under penal statutes in the nature of police regulations and involving punishment by fine only must, and can only, be conducted in the name of the District of Columbia, and by its counsel, the act clearly contemplates and provides for prosecution for any violation of its provisions in the name, and by an attorney, of the United States only.

That the Food and Drugs Act is a penal statute in the nature of police regulation can not be doubted; the title of the act, its object and provisions clearly so indicate, and the Court of Appeals of the District of Columbia has uniformly so held.

See, for example, the case of Dade *vs.* U. S., 40 App. D. C., 94, in which the language of the court is (p. 97):

"The pure food and drugs act is a police regulation enacted to conserve the public health."

And see, also, the case of U. S. *vs.* Capital Traction Company, 38 App. D. C., 471, in which it is held that the Act of Congress of May 23, 1908 (35 Stat. L., 246), providing in terms that prosecutions for violation of any of its provisions—

> "shall be on information of the Interstate Commerce Commission filed in the Police Court of the District of Columbia by or on behalf of the Commission,"

being in the nature of a police or municipal regulation. and the penalty for an offense thereunder being a fine only, the prosecution must be in the name of the District of Columbia.

And the body enacting the act, namely, the Congress of the United States, being conclusively presumed to have in mind all of its own enactments having possible bearing upon the subject treated, it is, accordingly, an irresistible inference and conclusion that it did not intend prosecutions under the act to be in a court the manner of conducting prosecutions in which, by that body's own clear prescription, is exclusive of the right in question.

In any other court of the United States than the Police Court of the District of Columbia, one accused and convicted of such an offense as that under consideration has both the absolute right of appeal, and also "to take the poor convict oath," as the expression is, and thereby obtain the benefit of the provisions of section 1042, R. S. U. S., to neither of which rights is one so accused, and convicted in the Police Court entitled.

The obvious result of this is, that to contend that the Police Court has the jurisdiction invoked is to say that the Food and Drugs Act may be given greater punitive force and effect in the District of Columbia, than

elsewhere; that the Police Court of the District of Columbia has greater jurisdiction and power in the administration of the act than is or could be had and exercised by any other court within the United States; that the act may be made to operate unequally upon persons within and those without the District of Columbia, and that the former may be denied equal protection of the law with the latter. To state this contention is to confute it; to argue it would be unduly to dignify it.

And, if Congress had designedly enacted that offenders against the Food and Drugs Act in the District of Columbia should be tried in the Police Court of the District, and like offenders elsewhere should be tried in other courts, in which the rights of accused would be greater—as in the particulars of the right of appeal and the right to take the "poor convict oath"—its enactment, as to the District of Columbia, would be void as discriminating against residents of the District and denying them the equal protection of the law.

This is true in principle, and is illustrated in a well-considered case in Michigan. By the act creating it, the Police Court of Grand Rapids, a court of defined limited jurisdiction, was given jurisdiction of all offenses not punishable by imprisonment in the penitentiary, but, in respect of challenging jurors, the rights of one accused in that court were more restricted than those of one accused in a county court of the State. The offense of selling liquor on Sunday was, as to the penalty prescribed, within the jurisdiction of the Police Court of Grand Rapids, and also of the county courts throughout the State. The Supreme Court of the State held that the discrimination between accused in the particular mentioned did not give equal protection to those within and those without Grand Rapids, and that for this

reason the Police Court had not jurisdiction of the offense.

Peo *vs.* Mangold, 71 Mich., 335.

This case is directly pertinent, and it is interesting to note that the question of jurisdiction was first raised on a motion for rehearing, after the appeal of the accused had been heard and his conviction affirmed—on the universally recognized principle that the question of jurisdiction is always open to consideration pending the case in which it is raised, and however it may be raised.

Against the contention here made that the Police Court of the District of Columbia is not one of the "proper courts of the United States," within the meaning of the Food and Drugs Act, as aforesaid, counsel for the United States and the learned justice presiding in the court below opposed the decision of the Court of Appeals of the District of Columbia in the case of Huyler's *vs.* Houston, 41 App. D. C., 452, above mentioned, the learned justice, in the course of his opinion quashing the petitioner's writ of certiorari and also at its conclusion stating that he felt bound by that decision.

In the preparation of this brief counsel for the plaintiff in error have carefully examined the record and briefs, as also the opinion of the court, in the Huyler case, and are respectfully constrained to submit that the decision in the case is not conclusive and should not be held binding in the premises.

The Huyler case was a suit in equity in which the plaintiff, a corporation, which had been convicted in the Police Court of the charge of selling adulterated maple sugar (the information was in two counts, one charging adulteration and one charging misbranding, the verdict and judgment on the former being guilty, and on the

latter not guilty), filed its bill in the Supreme Court of the District of Columbia against the Secretary of Agriculture seeking to enjoin him from making publication of the notice of judgment in conformity with the regulation hereinbefore set forth. The pertinent allegations of the bill are as follows:

> "That plaintiff is advised that the said Act of Congress is a lawful one, but that a true and proper construction thereof excludes the jurisdiction of the Police Court of the District of Columbia, it not being *a* court of the United States within the meaning and proper interpretation of the said Act of Congress, from jurisdiction to try and determine the offense alleged under said act, or from any jurisdiction whatsoever, in regard to the enforcement of the terms thereof. . . . That the prosecution in said court is in direct violation of the said Act of Congress, which provides that all prosecutions under the said act shall be in the proper courts of the United States, *thereby meaning a Constitutional Court of the United States*, and is a denial of the Constitutional rights of the plaintiff, which, as a body corporate of the State of New York, is entitled to a trial in a Constitutional Court."

In his answer to a rule to show cause issued upon the bill, the Secretary of Agriculture set forth certain matters and things in the light whereof he averred that the question of jurisdiction in the case was *res adjudicata* and that he was advised that the allegations concerning the jurisdiction of the Police Court were a mere conclusion of law which he was not called upon to answer. He also, at the same time, filed a demurrer to the bill, but the record in the case did not otherwise present the question under consideration than as above appears.

The bill of complaint was dismissed by the trial court, and the plaintiff appealed to the Court of Appeals

of the District of Columbia, assigning but three errors, as follows:

> "I. The court erred in holding that the Police Court is a proper court of the United States within the meaning of the Pure Food and Drugs Act of June 30, 1906.
>
> "II. The court erred in holding that the Police Court of the District of Columbia is a Constitutional Court of the United States which court is intended to be named as the proper court of the United States by the said Foods and Drugs Act of June 30th, 1906.
>
> "III. The court erred in sustaining the demurrer to the bill of complaint and ordering the dismissal of the said bill."

In the brief for appellant counsel contended, as to the Police Court, only that it "is not a proper court of the United States, or in any sense a court of the United States," relying for the contention solely upon the argument that it is not a court of the United States within the meaning and contemplation of the Constitution and of the laws of Congress creating and dealing with courts of the United States by that designation, and summing up the matter in these words:

> "In the light of the decisions culminating in the decision of the Hof case in 174 U. S., it is respectfully submitted that the Police Court is not an inferior court of the United States, but that the judges of such court are in some sense legislative judicial officers."

While in the brief for the United States counsel exceeded somewhat the limits of the discussion as set by counsel for the appellant, the brief of the former did not present or discuss the grounds hereinabove presented in support of the present contention that the Police Court is not one of the "proper courts of the United States,"

as above considered; and in the brief opinion of the Court of Appeals disposing of the case, no reference thereto or discussion thereof is discovered. In the opinion says the court:

> "It is the contention of the appellant that the Police Court is not a proper court of the United States within the meaning of said sec. 5 of the Food and Drugs Act."

But it does not state the ground of this contention, which, as hereinbefore shown, is that that court is not "*a* court of the United States," and that in using the expression "proper court of the United States" the Food and Drugs Act meant "a Constitutional court of the United States." And the opinion concludes thus:

> "The question here is not whether the Police Court is a court of the United States in the Constitutional sense, but whether it is a 'proper court of the United States,' within the meaning of the Food and Drugs Act. All other petty offenses against the United States, except those expressly reserved from its jurisdiction, are triable in that court, and no reason is perceived why one accused of adulterating food in this District is entitled to treatment different than would be accorded him if accused of some other petty offense against the laws of the United States. When, therefore, Congress used the words 'in the proper courts of the United States,' we think it clear that it meant in the courts having jurisdiction of similar offenses, The Police Court was therefore a proper court within the meaning of this section."

As is obvious, this utterance at no point touches the contentions now made, and the expression—

> "and no reason is perceived why one accused of adulterating food in this District is entitled to treatment different than would be accorded him if accused of some other petty offense against the laws of the United States,"

may respectfully be put into juxtaposition with the proposition hereinabove earnestly contended for, that no reason may be perceived why any one accused of adulterating food in this District should be subjected to treatment different than would be accorded to one so accused outside of the District.

And it may likewise respectfully be suggested that the question under consideration does not turn, and can not be made to turn, upon the inquiry whether "one accused of adulterating food in this District is entitled to treatment different than would be accorded him if accused of some other petty offense against the laws of the United States," the question being whether the tribunal in which he is attempted to be subjected to such treatment is the one entitled to administer it. The Police Court of the District of Columbia is expressly excluded from jurisdiction over cases involving violation of the post-office and pension laws of the United States. Suppose Congress to create an offense against the post-office or pension laws involving the penalty of fine only, would it be contended that, in face of this specific exclusion of jurisdiction, the Police Court could try a case arising under such an enactment?

And it is deferentially submitted that it was an inadvertence on the part of the court to characterize the offense under consideration as a "petty offense against the United States." So far to the contrary is the view of the law-making power creating the offense that it has attached thereto the extraordinary and degrading punishment of denunciation of the offender as an adulterator of food intended for consumption by the public, and constituted the sovereign of the land the agency of making proclamation throughout the country of the guilt of the offender, using in that behalf its potent, multiform, and ubiquitous instrumentalities to the end

of affixing to the offender "a badge of disgrace" beside which many another stigmatization might well be deemed a decoration, and in comparison of the punishment by which the imposition of the maximum fine might fairly seem the utmost stretch of leniency.

The contentions and considerations here presented were not before the court in the Huyler case, and to them the merited attention of the court is earnestly requested.

2. Assuming the Police Court of the District of Columbia to be a "proper court of the United States" to try an information against an accused for violating the Food and Drugs Act, that court may yet not try such an information on which its sentence may involve punishment in the penitentiary.

Counsel for the petitioner are not unmindful of the fact that certain aspects of this proposition have had the attention of the Supreme Court of the District of Columbia and the Court of Appeals of the District of Columbia, and assume that counsel for the respondent will contend that discussion of the question is foreclosed. It remains, however, the duty of counsel to present the following considerations, apparently to counsel conclusive of the soundness of the proposition stated.

The Code of Law for the District of Columbia, sec. 934, above quoted, in terms provides as follows:

> "When any person is sentenced for a term longer than six months and not longer than one year, such imprisonment *shall* be in the jail, and where the sentence is imprisonment for more than one year, it *shall* be in the penitentiary. Cumulative sentences aggregating more than one year *shall* be deemed one sentence for the purposes of the foregoing provision."

Ex vi termini, the expression "cumulative sentences" postulates a prosecution and trial of more than one offense; there can not be more than one sentence for one offense. It unanswerably follows that this provision of the Code was industriously intended to mean, and means only, that whenever, on a prosecution in the District of Columbia, the pentitentiary is in sight of the accused, it must also be in sight of the court trying him; and as, to use a colloquialism, the Police Court can not "see the penitentiary," it may not try one whose punishment may land him in that institution.

And it is beside the question to say that when the Police Court is trying one accused of several separate and distinct offenses, its jurisdiction is to be determined by the fact that each of the offenses, tried separately, would be within such jurisdiction; for that jurisdiction is made to depend upon the effect of conviction—it was not the intention of Congress, but just the contrary, to confide to the inferior court, the Police Court, the power to punish offenders by imprisonment in the penitentiary; the law-making power was considering as much the character and dignity of the court inflicting, as the amenability of offenders receiving, so grave a punishment.

The question involved is enlightened by the decisions of courts in analogous cases.

A law of Kentucky made it an offense to maintain a fence across a public highway, and prescribed a penalty of $1 a day for so doing. Another law of the State gave justices of the peace jurisdiction of all offenses the punishment for which was less than a fine of $10. A charge of maintaining such a fence for 150 days was held without the jurisdiction of a justice of the peace, as the penalty to follow was beyond that which he might impose.

Comm. *vs.* Mills, 69 Ky., 296.

The Constitution of North Carolina limited the jurisdiction of justices of the peace in criminal matters to cases in which the fine might not exceed $50, or the imprisonment thirty days. A statute of the State punished the offense of allowing hogs to run at large by a fine of not more than $10 for each hog. A justice of the peace was held without jurisdiction of a case charging the accused with allowing eight hogs to run at large, the court saying:

> "This statute makes a violation of section 1, a misdemeanor, and does not prescribe any punishment, except as to each hog. But Article IV, Section 27, of the Constitution fixes the jurisdiction of Justices of the Peace, and limits it in criminal matters to cases in which the fine *can not exceed fifty dollars*, or the imprisonment thirty days. And under this statute the fine is limited to ten dollars for each hog—'the fine shall not exceed ten dollars for each hog allowed to run at large.' And, although he was only fined two dollars a hog, or sixteen dollars for the eight, he *might have been* fined as much as eighty dollars, this being thirty dollars in excess of his jurisdiction. It is therefore plain to see that the Justice of the Peace did not have jurisdiction."
>
> State *vs.* Wiseman, 131 N. C., 795, 796.

This is in strict accord with the only true, and universally recognized, principle that the jurisdiction of a court is to be determined by what it *may* do in a given case—saving the observation of the learned justice of the Supreme Court of the District of Columbia in this case, and of counsel for the defendant in error in his brief (p. 8), that the contention of counsel for the plaintiff in error does not seem logical,

> "for it would seem to anticipate a conviction on more than one count, and an effort on the part of the court to go beyond its jurisdiction in the assessment of fines and imprisonment."

The reply to this—superfluous though it may seem—obviously is, that on a trial of the information in question, the Police Court *might* find the petitioner guilty on every one of the seven counts, and *might* sentence him to pay a fine of $200 on each count, and to be imprisoned for one year on account of each fine unless it were paid; and *might* make the sentences cumulative, so as to constitute one sentence of seven years, which the law says would have to be served in the penitentiary—to which institution the vision of the Police Court can not by law extend, and from which the plaintiff in error could not save himself by taking the "poor convict oath."

Respectfully submitted.

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Of Counsel.

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CITATIONS.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

WILLIAM A. HARTRANFT, PLAINTIFF IN error,
v.
ALEXANDER R. MULLOWNY, JUDGE OF the Police Court of the District of Columbia. } No. 381.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

An information was filed in the Police Court of the District of Columbia against William A. Hartranft for selling adulterated milk in violation of the Food and Drugs Act (ch. 3915, 34 Stat. 768). The defendant attacked the jurisdiction of the Police Court by motion to quash, by demurrer, and by special plea in bar, all of which were successively overruled.

Thereupon, before trial on the merits, the defendant filed in the Supreme Court of the District of Columbia a petition for a writ of certiorari, averring that the Police Court was without jurisdiction. The writ of certiorari was granted, but on motion of the Government was quashed and the case remanded to the Police Court for trial. An appeal from the judgment quashing the writ was taken to the Court of Appeals of the District of Columbia, which affirmed the judgment. (43 App. D.C. 44.) Plaintiff in error then brought the case to this court on writ of error.

At the last term the Solicitor General, on behalf of the defendant in error, moved to dismiss the case for want of jurisdiction in this court. The consideration of the motion was postponed until the hearing on the writ of error.

QUESTIONS PRESENTED.

The questions presented are:

1. Is this a case arising under the criminal laws?

2. Is the judgment of the Court of Appeals of the District of Columbia a final judgment?

3. Is the Police Court of the District of Columbia a "proper court" under the Food and Drugs Act?

4. Is the jurisdiction of the Police Court under the Food and Drugs Act, if such jurisdiction exists, confined to cases which charge only a single violation of the act?

These questions will be considered in their order.

ARGUMENT.

I.

This is a case arising under the criminal laws.

In this case the information charged the plaintiff in error with a violation of section 7, paragraph sixth, of the Food and Drugs Act, which provides:

> SEC. 7. That for the purposes of this act an article shall be deemed to be adulterated: * * *
>
> In the case of food:
>
> * * * * *
>
> Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.

Violations of this act are misdemeanors. (Section 2.)

The petition for certiorari attacks the jurisdiction of the Police Court over the crimes alleged on the same grounds as those set out in the information.

The certiorari proceeding is not a new case, but an appellate proceeding in the criminal case.

The writ of certiorari was granted by the Supreme Court of the District of Columbia under section 68 of the District Code, which provides:

> The said Supreme Court may * * * issue writs of * * * certiorari * * * and all other writs known in common law and equity

practice that may be necessary to the effective exercise of its jurisdiction.

Section 68 of the District of Columbia Code is similar in scope to section 262 of the Judicial Code. Under the latter section, a writ of certiorari like the present one is essentially a proceeding for review. (*In re Chetwood*, 165 U. S. 443, 461, 462; *McClellan* v. *Carland*, 217 U. S. 268, 278, 279; see also *United States* v. *Beatty*, 232 U. S. 463, 467, 468.)

There is no statute prescribing the functions of, or regulating the procedure by, certiorari in the District of Columbia, hence we must look therefor to the common law. The writ lies to inferior courts and to special tribunals exercising judicial or quasi-judicial functions, to bring their proceedings into the superior court, where they may be reviewed and quashed if it be made plainly to appear that such inferior court or special tribunal had no jurisdiction of the subject matter, or had exceeded its jurisdiction, or had deprived a party of a right or imposed a burden upon him or his property without due process of law. (*Degge* v. *Hitchcock*, 35 App. D. C. 218, 226.) See also *Bond* v. *Carter Hardware Co.*, 15 App. D. C. 72, 74; Spelling, Injunctions and Other Extraordinary Remedies, 2d Ed., pp. 1630, 1631, 1765; Harris, Certiorari, pp. 41, 294.

It is submitted, therefore, that this is a criminal case or, at least, a case arising under the criminal laws.

Section 250 of the Judicial Code provides:

> Except as provided in the next succeeding section, the judgments and decrees of said Court of Appeals shall be final in all cases *arising under* the patent laws, the copyright laws, the revenue laws, *the criminal laws*, and in admiralty cases.

The words "cases arising under the criminal laws" are broader than the expression "criminal cases." This court, in construing these words in the act of March 3, 1891, ch. 517, sec. 6 (26 Stat. 828), held:

> A writ of *scire facias* upon a recognizance to answer to a charge of crime, even if it be, technically considered, a civil action, and only incidental and collateral to the criminal prosecution, is certainly a case arising under the criminal laws; * * *. (*Hunt* v. *United States*, 166 U. S. 424, 426.)

So, too, an action at law on a bail bond (*United States* v. *McGlashan*, 170 U. S. 703) and some contempt proceedings (*Cary Manufacturing Company* v. *Acme Flexible Clasp Company*, 187 U. S. 427; *O'Neal* v. *United States*, 190 U. S. 36) are cases arising under the criminal laws.

Since in a case arising under the criminal laws the judgment of the Court of Appeals of the District of Columbia is "final," the fact that the jurisdiction of the Police Court is in issue does not give a right to bring the case to this court. (*United States ex rel. Chott* v. *Ewing*, 237 U. S. 197; *Gompers* v. *United States*, 233 U. S. 604.)

II.

The decision complained of is not a final judgment.

The right to have this court review any ruling of the Court of Appeals of the District of Columbia is confined to a "final judgment or decree" of that court. (Judicial Code, sec. 250.) So this court will not now review the instant case because, even if it be not a "case arising under the criminal laws," there has been no final judgment.

The essentials of a final judgment have been frequently stated by this court.

> A decree is final for the purposes of an appeal to this court when it terminates the litigation between the parties *on the merits of the case* and leaves nothing to be done but to enforce by execution what has been determined. (*Heike* v. *United States*, 217 U. S. 423, 429, quoting from *St. Louis, Iron Mountain & Sou. R. R.* v. *Express Co.*, 108 U. S. 24, 28.) [Italics ours.]
>
> The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties *on the merits of the case*, so that if there should be an affirmance here the court below would have nothing to do but to execute the judgment or decree it had already rendered. (*Macfarland* v. *Brown*, 187 U. S. 239, 246, quoting from *Bostwick* v. *Brinkerhoff*, 106 U. S. 3.) [Italics ours.]

A holding that the trial court has jurisdiction and the case must proceed on its merits is, of course, not a final decree. (*McLish* v. *Roff*, 141 U. S. 661.)

Under these rulings, the judgment in the present case is plainly not final, since the Court of Appeals merely held the Police Court had jurisdiction and then remanded the case to that court for trial.

> It may be that upon trial the defendant will be acquitted on the merits. It may happen that for some reason the trial will never take place. In either of these events there can be no conclusive judgment against the defendant in the case. (*Heike* v. *United States*, *supra*, p. 430.)

III.

The Police Court of the District of Columbia is a proper court under the Food and Drugs Act.

The Food and Drugs Act provides:

> SEC. 5. That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this act * * * to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided.

The plaintiff in error urges the Police Court of the District of Columbia is not "a proper court" within the meaning of this section.

The unsoundness of this contention is pointed out by the Court of Appeals in *Huyler's* v. *Houston*, 41 App. D. C. 452, 455–456:

> The question here is not whether the police court is a court of the United States in the constitutional sense, but whether it is a "proper court of the United States," within the meaning of the food and drugs act. All other petty offenses against the United States, except those expressly reserved from its jurisdiction, are triable in that court, and no reason is perceived why one accused of adulterating food in this District is entitled to treatment different than would be accorded him if accused of some other petty offense against the laws of the United States. When, therefore, Congress used the words "in the proper courts of the United States," we think it clear that it meant in the courts having jurisdiction of similar offenses. The police court was therefore a proper court within the meaning of this section.

The plaintiff in error urged some special reasons, however, against the jurisdiction of the court, and these will be considered separately.

First. It was said that the Food and Drugs Act, in not only prescribing a fine but requiring publication of notices of judgments (Food and Drugs Act, sec. 4), goes beyond the jurisdiction of the Police Court, since the jurisdiction of that court is limited to crimes punishable by fine or by imprisonment not exceeding one year. (Code D. C., sec. 43.)

The publication of the judgment through the Department of Agriculture, however, is not a punishment for the crime.

> The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute. (*Banks* v. *Manchester*, 128 U. S. 244, 253.)

The United States and the States, moreover, should see to it that the decisions of the courts are made public for the guidance of their citizens. (See *Nash* v. *Lathrop*, 142 Mass. 29, 35; *Banks & Bros.* v. *West Publishing Company*, 27 Fed. 50, 57, 60.) For this reason it is usual to require that judgments be published. (Judicial Code, sec. 225.)

Second. It was pointed out that the general requirement that prosecutions in the Police Court for violations of penal statutes in the nature of police regulations be conducted by the corporation counsel (Code D. C. 932) is inconsistent with the specific requirement that violations of the Food and Drugs Act be prosecuted by the United States Attorneys. (Food and Drugs Act, sec. 5.) This inconsistency concerning the proper prosecuting officer, however, does not touch the jurisdiction of the court, and the Food and Drugs Act repeals those provisions of the laws of the District of Columbia to which it is repugnant. (*District of Columbia* v. *Coburn*, 35 App. D. C. 324.) The later and more specific requirement

in the Food and Drugs Act designating the proper prosecuting officer naturally supersedes the provision in the local code, but the jurisdiction of the Police Court remains unchanged.

Third. It was urged that a defendant convicted in the Police Court does not have the same rights of appeal and of liberation in case of inability to pay a fine as a defendant convicted in a district court; hence, a defendant prosecuted in the Police Court would be denied the equal protection of the laws.

Since the Food and Drugs Act is, in its application to the District of Columbia, not only a regulation of interstate commerce but a local police law, the procedure in the District of Columbia may differ somewhat from that applicable to offenses in the States.

> Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny to it this right. We think it is not denied or taken away by anything in the Constitution of the United States, including the amendments thereto. (Mr. Justice Pitney in *Ocampo* v. *United States*, 234 U. S. 91, 99, quoting *Missouri* v. *Lewis*, 101 U. S. 22. See also *Gardner* v. *Michigan*, 199 U. S. 325, 333.)

The principles announced in this decision are equally applicable to Congress acting in the capacity of legislature of the District of Columbia.

However, a defendant in the Police Court is given substantially the same protection in reference to the matters complained of as is a defendant in a district court. Under section 227 of the Code of the District of Columbia, any justice of the Court of Appeals, to whom a petition is presented complaining of a judgment in the Police Court, may allow a writ of error. Under section 44 of the same code the Police Court may, in default of the payment of a fine, commit a defendant for such time as the court may think right, not to exceed one year. In the words of the Court of Appeals:

> It is apparent, therefore, that the special circumstances of a given case may be taken into consideration by the Police Court, and hence that the supposed difference in the degree of punishment in the Supreme Court and the Police Court really does not exist. (R. p. 27.) (43 App. D.C. 44, 47)

The plaintiff in error is denied no constitutional right.

IV.

The jurisdiction of the Police Court under the Food and Drugs Act is not limited to cases which charge only a single violation.

Under section 43 of the Code of the District of Columbia, the Police Court has no jurisdiction over offenses punishable by imprisonment in the penitentiary.

Section 934 of the Code of the District of Columbia, in part, provides:

> * * * When any person is sentenced for a term longer than six months and not longer than one year such imprisonment shall be in the jail, and where the sentence is imprisonment for more than one year it shall be in the penitentiary. Cumulative sentences aggregating more than one year shall be deemed one sentence for the purposes of the foregoing provision. When the punishment of an offense may be imprisonment for more than one year the prosecution shall be in the Supreme Court of the District. When the maximum punishment is *a fine only or* imprisonment for one year or less the prosecution may be in the police court.

Section 44 of the Code of the District of Columbia, in part, provides:

> * * * In all cases where the said court shall impose a fine it may, in default of the payment of the fine imposed, commit the defendant for such a term as the court thinks right and proper, not to exceed one year.

Plaintiff in error contends that since the information contains seven counts he might, in default of payment of fines imposed, be committed for terms aggregating as much as seven years.

The Food and Drugs Act provides, in cases like the one at bar, for no penalty except the payment of fines. The aggregate of maximum fines authorized in this case would not exceed the amount the Police Court

may impose, nor would the case fall without the jurisdiction of the Police Court unless imprisonment in the penitentiary could be imposed as part of the penalty. Plaintiff in error could be imprisoned, if at all, only under section 1042, Revised Statutes, or section 44 of the District of Columbia Code for failure to pay the fines imposed and not as part of the penalty provided by the Food and Drugs Act. Assuming, as plaintiff in error contends, that the Police Court may act only under section 44 of the District of Columbia Code, rather than under section 1042, Revised Statutes, still the Police Court would not be ousted of its jurisdiction because of possible plurality of prison sentences, since their aggregate, though amounting to more than one year, would not have to be served in the penitentiary.

> We are of opinion that the language of section 934 of the Code, "cumulative sentences aggregating more than one year shall be deemed one sentence for the purposes of the foregoing provision," has no reference to a sentence to pay a pecuniary fine, followed by imprisonment in default of payment, but relates only to cases in which the punishment is to be imprisonment. (*Harris* v. *Lang*, 27 App. D. C. 84, 89.)

Were it otherwise the Police Court would be denied jurisdiction in all cases charging more than a single violation of the law, since in every such case imprisonment in default of the payment of a fine might exceed one year.

The petition, moreover, is premature. The jury might convict of only a single violation. Should the plaintiff in error be convicted of more than one violation and fail to pay the fines imposed, the Police Court might commit him for terms aggregating less than one year. An appellate court will not assume a trial court will exceed its jurisdiction in imposing a sentence.

CONCLUSION.

The writ of error should be dismissed or the decision of the Court of Appeals affirmed.

E. MARVIN UNDERWOOD,
Assistant Attorney General.

FEBRUARY, 1915.

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In the Supreme Court of the United States.

OCTOBER TERM, 1915.

WILLIAM A. HARTRANFT, PLAINTIFF IN error,
v.
ALEXANDER R. MULLOWNY, JUDGE OF THE Police Court of the District of Columbia.
No. 381.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION TO ADVANCE, OR TO PLACE ON THE SUMMARY DOCKET.

Comes now the Solicitor General, on behalf of defendant in error, and moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

An information was filed in the Police Court of the District of Columbia against plaintiff in error for selling adulterated milk in violation of the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768. He challenged the jurisdiction of the court by motion to quash, by demurrer, and by special plea in bar, all of which were overruled. Thereupon, before trial upon the merits, he filed in the Supreme Court of the District of Columbia a

petition for *certiorari* on the ground that the Police Court was without jurisdiction of the cause, because:

1. Said court was not a "proper court" within the meaning of section 5 of the Food and Drugs Act.

2. The maximum sentence authorized by law for the alleged violations of said act exceeded in the aggregate the maximum penalty said court was authorized to impose.

The writ of certiorari was granted, but on motion of the Government was quashed and the case remanded to the Police Court for trial. An appeal from the judgment quashing the writ was taken by plaintiff in error to the Court of Appeals of the District, which affirmed the judgment of the Supreme Court, from which judgment of affirmance plaintiff in error sued out a writ of error from this court.

The case presents *inter alia* the question whether within the meaning of the Food and Drugs Act the Police Court of the District of Columbia is a court having jurisdiction of violations of said act committed in the District. It is thus one of importance to the Government in prosecuting violations of said act, and for that reason an early determination thereof by this court is desirable.

It is suggested, however, that as the case presents questions which do not seem to require extended argument it be placed upon the summary docket.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

NOVEMBER, 1915.

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SUBJECT INDEX.

STATUTES CITED.

AUTHORITIES CITED.

IN THE

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vs.

ALXEANDER R. MULLOWNY, JUDGE OF THE POLICE COURT OF THE DISTRICT OF COLUMBIA.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Brief in Behalf of Plaintiff in Error.

I.

Statement of the Case.

On April 17, 1914, there was filed in behalf of the United States, in the Police Court of the District of Columbia, against the plaintiff in error (hereinafter called petitioner) an information in seven counts charging seven separate and distinct violations by the petitioner of the Food and Drugs Act, so-called, of the Congress of the United States, of June 30, 1906. Each count charges that the petitioner—

> "unlawfully did offer for sale and did sell [to a person named] a certain adulterated article of

> food—that is to say, a certain quantity of milk, which said food was adulterated, in that it did consist in whole and in part of a filthy and decomposed and putrid animal and vegetable substance, against the form of the statute in such case made and provided, and against the peace and government of the United States" (Rec., pp. 7-9).

On April 20, 1914, petitioner moved to quash the information upon nine grounds separately specified (Rec., pp. 10-11).

The motion to quash was overruled (Rec., p. 10), and thereupon the petitioner moved the court to require the United States to give him a bill of particulars in respect of six separately specified matters (Rec., p. 11), which motion was granted (Rec., p. 10), and what purports to be a bill of particulars was filed setting forth—

> "that the said food was adulterated in that it contained bacteria, including the colon bacillus and streptococci, indicating filth and decomposition" (Rec., p. 11);

whereupon the petitioner filed a motion for a more specific bill of particulars upon eight specific grounds separately stated (Rec., p. 12), which motion was overruled (Rec., p. 10).

Thereupon the petitioner filed a demurrer to the information upon the same grounds assigned in his motion to quash (Rec., pp. 12-13), which demurrer was overruled (Rec., p. 10); and the petitioner then filed a special plea in bar (Rec., pp. 13-15), which, upon motion of the United States (Rec., pp. 15-16), was stricken out; and thereupon the petitioner filed a motion to compel an election by the United States on which one of the counts of the information it would proceed, upon two grounds separately assigned (Rec., p. 16), and this motion also was overruled (Rec., p. 10).

Thereupon, and on May 6, 1914, the petitioner was arraigned upon the information, pleaded not guilty thereto, and demanded a trial by jury thereon, which was granted and set for May 20, 1914 (Rec., p. 3).

All of the foregoing proceedings were had and taken upon the information aforesaid by the defendant in error (hereinafter called respondent), sitting in and presiding over the said Police Court, as one of the judges thereof (Rec., p. 3).

On May 7, 1914, the petitioner filed in the Supreme Court of the District of Columbia his petition praying that the writ of certiorari issue from that court to the respondent, and the writ was duly issued as prayed (Rec., pp. 1-6).

The respondent duly, and on May 11, 1914, made return to the writ of certiorari, setting forth the information and a memorandum of the proceedings thereon as aforesaid (Rec., pp. 7-10); and subsequently, and on May 14, 1914, the respondent moved to quash the said writ, upon the sole ground that the said Police Court had jurisdiction and had assumed jurisdiction of the cause of action against the petitioner (Rec., p. 17).

Upon consideration of the said motion to quash, the Supreme Court of the District of Columbia, on June 3, 1914, granted the same, and the petitioner duly appealed to the Court of Appeals of the District of Columbia (Rec., p. 23), which court affirmed the judgment of the Supreme Court of the District of Columbia (Rec., p. 29), and the writ of error herein was sued out and allowed (Rec., p. 32).

The grounds upon which the petitioner based his petition for the writ of certiorari are set forth in paragraphs 13 to 17, both inclusive, of his petition (Rec., pp. 3-5), and are more particularly considered hereinafter.

In overruling the motion to quash the writ of certiorari the Supreme Court of the District of Columbia filed a written opinion (Rec., pp. 17-22), which, and the opinion of the Court of Appeals, in affirming the judgment, are also more particularly considered hereinafter.

II.

Assignments of Error.

The court below erred as follows:

1. In holding that the Police Court of the District of Columbia is a proper court of the United States, within the meaning of the Food and Drugs Act, so-called, of the Congress of the United States of June 30, 1906, in which a prosecution for violation of the provisions of the said act may be had.

2. In not holding that the said Police Court is not such proper court, for the reasons set forth in the petition herein, namely: (1) In and by the said Food and Drugs Act, so-called, it is enacted and provided that violations of the provisions thereof shall be "prosecuted in the proper courts of the United States," and the said Police Court is not such a court, because (*a*) if any person prosecuted therein for a first offense against the said act should be convicted and fined, and unable to pay the fine imposed, he would be subject to possible imprisonment for one year, whereas no such alternative penalty could be inflicted upon a person so prosecuted and convicted in any other court; and (*b*) the said Police Court could not try any person charged with a second offense against said act, for that the penalty for such second offense is beyond the jurisdictional power of the said court to impose. (2) A person prosecuted in the said Police Court for any violation of the said act would have no right of appeal from his conviction, or writ of error in respect thereof, whereas such right, as of course,

would belong to any person so prosecuted in any other court.

3. In not holding that the said Police Court has not jurisdiction to try the information in the petition in this cause set forth, for that the said information containing seven counts the petitioner, upon convicton thereon, may be subjected by the judgment of the said Police Court to a greater punishment than it is lawfully within its power to inflict, namely, the punishment of seven separate and distinct fines in the amount of two hundred dollars ($200) each, and, in default of the payment of the same, seven separate and distinct commitments to imprisonment for the period of one year each, or a punishment in all of fines to the amount of fourteen hundred dollars ($1400), and, in default of the payments thereof, imprisonment for a period of seven (7) years in the aggregate.

4. In not holding that the said Police Court has not jurisdiction to try the said information, for that, if the petitioner be convicted thereon, he will be subjected, in addition to the penalty of fine or imprisonment in default of payment thereof, to the penalty of a publication of the said judgment, as provided by the said Food and Drugs Act, so-called.

5. In not holding that, if the said Police Court has jurisdiction to try the said information, the same should have been filed and prosecuted in the name and on behalf of the District of Columbia, instead of in the name and on behalf of the United States of America.

6. In affirming the judgment of the Supreme Court of the District of Columbia quashing the writ of certiorari issued herein.

7. In not reversing the judgment of the Supreme Court of the District of Columbia herein.

III.

Argument.

The prosecution of the petitioner in the Police Court of the District of Columbia was instituted under the Act of Congress of the United States of June 30, 1906, entitled—

> "An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded, or poisonous or deleterious, foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes" (34 Stats. at L., 768),

commonly called and known as "The Food and Drugs Act, June 30, 1906."

The contention of the petitioner was in the courts below, and is here, *not* that the Supreme Court of the District of Columbia had jurisdiction concurrently with the Police Court of the District of Columbia, to try the petitioner upon the information filed against him, *but* that the Police Court was without any jurisdiction so to try him. The grounds of this contention are, as aforesaid, set forth in paragraphs numbered from 13 to 17, both inclusive, of the petition for the writ of certiorari (Rec., pp. 3-5), and are as follows:

> 13. By the terms and provisions of the said Food and Drugs Act, so-called, it is, among other things, provided by Section 2 thereof, that any person. who shall sell or offer for sale in the District of Columbia any food adulterated within the meaning of the said Act, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars ($200) for the first offense, and, upon conviction, for each subsequent offense not exceeding three hundred dollars ($300), or be imprisoned not exceeding one year, or both, in the discretion of the court, and by Section 4 thereof, that, after judgment of a court in any case arising under said Act, notice thereof

shall be given by publication in such manner as may be prescribed by rules and regulations for carrying out the provisions of the said Act made as therein and thereby provided, which said rules and regulations have been duly made, and in accordance therewith notice of every such judgment as aforesaid, notwithstanding any pending appeal therefrom, is publicly given by the Department of Agriculture of the United States, or the Secretary thereof, and the same distributed at large throughout the United States; wherefore, if the petitioner be convicted upon the information aforesaid, notice of such, his conviction, will be published and distributed as aforesaid, as well to his competitors in business as to the public of the United States in general, to his great discredit and disadvantage, and by way of punishment in excess of and in addition to that by fine and imprisonment as aforesaid.

14. In and by Section 43 of the Code of Law for the District of Columbia, it is enacted and provided, among other things, that the said Police Court of the District of Columbia shall have original jurisdiction concurrently with the Supreme Court of the District, except where otherwise expressly in the said Code provided, of all crimes and offenses committed in the said District not capital or otherwise infamous, and not punishable by imprisonment in the penitentiary, except libel, conspiracy, and violation of the Post-Office and Pension laws of the United States; by Section 934 of the said Code, it is, among other things, enacted and provided as follows: "When any person is sentenced for a term longer than six months and not longer than one year, such imprisonment shall be in the jail, and where the sentence is imprisonment for more than one year, it shall be in the penitentiary. Cumulative sentences aggregating more than one year shall be deemed one sentence for the purposes of the foregoing provision. When the punishment of an offense may be imprisonment for more than one year, the prosecution shall be in the Supreme

Court of the District. When the maximum punishment is a fine only or imprisonment for one year or less, the prosecution may be in the Police Court," meaning the said Police Court of the District of Columbia; by Section 44 of the said Code, it is, among other things, enacted and provided that in all cases where the said Police Court shall impose a fine, it may, in default of the payment of the fine imposed, commit the defendant for such a term as the court thinks right and proper, not to exceed one year; and by Section 227 of the said Code, it is, among other things, enacted and provided, that under certain circumstances and upon compliance with certain conditions, any justice of the Court of Appeals of the said District may, if in his opinion proper, allow a writ of error in any cause tried in the said Police Court, but is not obliged so to do; wherefore, if the petitioner be convicted in the said Police Court upon the information aforesaid, he will be without right, as of course, to have his conviction reviewed and any errors of law that may be committed upon his trial corrected, but will be dependent for a review of his conviction or the correction of such errors upon the judgment and discretion of a justice of the said Court of Appeals, and upon such only, and without opportunity to be heard in respect of any petition or application for such review or correction other than by presénting such petition or application and the grounds thereof to such justice for his consideration.

15. Should the petitioner be convicted in the said Police Court upon the said information and fined as aforesaid, with the alternative of imprisonment, in case of his inability to pay such sum or sums as may be assessed against him by way of fine, he will be obliged to serve and undergo such imprisonment, without right or opportunity of relief therefrom, save and except by pardon; whereas, if he were tried and convicted on the said information in this, the Supreme Court of the District of Columbia, or any District Court of the United States, and be unable to pay such sum or

sums as aforesaid, he would have the right and remedy of being released from imprisonment on account thereof, in accordance with the provisions in that behalf of Section 1042 of the Revised Statutes of the United States; by reason whereof, if the said Police Court of the District of Columbia have jurisdiction of such alleged violations of the Food and Drugs Act, so-called, as purport to be set forth in the said information, the punitive force and effect of the said Act in the District of Columbia will be greater than elsewhere throughout the United States, giving the said Police Court greater jurisdiction and power in the administration of the said Act than is, or could be, had and exercised by any other court within the United States, thereby making the operation of the said Act unequal and denying to persons within the jurisdiction of the District of Columbia equal protection with those resident within other jurisdictions of the United States.

16. The petitioner is advised, and therefore avers, that, even if said Police Court of the District of Columbia has jurisdiction of his person in respect of the matter purporting to be set forth in the said information, the said information does not sufficiently or at all inform him of the nature and cause of the accusation against him, and, accordingly, that his attempted trial thereon would deny him his Constitutional right in that behalf, and deprive him of protection therein.

17. The Police Court of the District of Columbia, of which as aforesaid the respondent is a judge presiding in the matter of the petitioner hereinbefore set forth, is without jurisdiction to try the petitioner upon the said information, for the following, among other, reasons:

(1) In and by the said Food and Drugs Act, so-called, it is enacted and provided that violations of the provisions thereof shall be "prosecuted in the proper courts of the United States," and the said Police Court is not such a court, because (*a*) if any person prosecuted therein for a first offense against the said Act should be convicted and

fined, and unable to pay the fine imposed, he would be subject to possible imprisonment for one year, whereas, no such alternative penalty could be inflicted upon a person so prosecuted and convicted in any other court; and (*b*) the said Police Court could not try any person charged with a second offense against said Act, for that the penalty for such second offense is beyond the jurisdictional power of the said court to impose.

(2) A person prosecuted in the said Police Court for any violation of the said Act would have no right of appeal from his conviction, or writ of error in respect thereof, whereas such right, as of course, would belong to any person so prosecuted in any other court.

(3) The joinder in the said information of seven separate and distinct offenses makes possible, as aforesaid, the imposition by the said Police Court, by a single judgment in the said cause, of a penalty beyond the jurisdictional power of the said court to impose; and—

(4) The said information, whether of itself or in connection with the pretended bill of particulars filed thereunder, does not sufficiently, or at all, inform the petitioner of the nature and cause of the accusation against him.

The questions presented by these contentions and the assignments of error may be stated in the following propositions, and will be considered accordingly:

1. The Police Court of the District of Columbia is not a "proper court of the United States," within the meaning of the Food and Drugs Act, in which a prosecution for violation of the provisions of that act may be had.

2. If the said Police Court be such proper court, it has not jurisdiction to try the information against the petitioner because of the inclusion therein of seven separate and distinct charges, the conviction of the petitioner on which might subject him to a penalty beyond the power of that court to inflict.

1. The Police Court of the District of Columbia is not a "proper court of the United States," as aforesaid.

(*a*) The Police Court as constituted by law.

The character of the Police Court, in one respect or another, has been the subject of repeated consideration by this court and the Court of Appeals of the District of Columbia, but, for the purposes of the present case, it is unnecessary to review the expressions and decisions of these courts on the subject. It is not of present concern or interest whether the Police Court be or be not a court of the United States in the constitutional sense, or in the category of courts of the United States in general: the proposition now submitted for consideration is whether, within the meaning of the Food and Drugs Act, the Police Court is one of the "proper courts of the United States" mentioned in section 5 of the act, which section is as follows:

> "That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this act, or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia, shall present satisfactory evidence of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided."

The jurisdiction of the Police Court is thus prescribed:

> "The said court shall have original jurisdiction concurrently with the Supreme Court of the District, except where otherwise expressly herein provided, of all crimes and offenses committed in the said District not capital or otherwise infamous and not punishable by imprisonment in the penitentiary, except libel, conspiracy, and violation of the post-office and pension laws of the United

States, and also of all offenses against municipal ordinances and regulations in force in the District of Columbia. The said court shall also have power to examine and commit or hold to bail, either for trial or further examination, in all cases, whether cognizable therein or in the Supreme Court of the District."

Code, D. C., sec. 43.

"In all cases where the said court shall impose a fine it may, in default of the payment of the fine imposed, commit the defendant for such term as the court thinks right and proper, not to exceed one year."

Code, D. C., sec. 44.

The provisions of law respecting prosecutions of offenses in the District of Columbia are as follows:

"That prosecutions in the Police Court shall be on information by the proper prosecuting officer."

Code, D. C., sec. 44.

"Prosecutions for violations of all police or municipal ordinances or regulations and for violation of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Columbia and by the Corporation Counsel or his assistants. All other criminal prosecutions shall be conducted in the name of the United States and by the attorney of the United States for the District of Columbia or his assistants."

Code, D. C., sec. 932.

The provisions respecting the place of imprisonment of offenders convicted in the District of Columbia are as follows:

"When any person shall be sentenced to imprisonment for a term not exceeding six months

> the court may direct that such imprisonment shall be either in the workhouse or in the jail. When any person is sentenced for a term longer than six months and not longer than one year such imprisonment shall be in the jail, and where the sentence is imprisonment for more than one year it shall be in the penitentiary. Cumulative sentences aggregating more than one year shall be deemed one sentence for the purposes of the foregoing provision. When the punishment of an offense may be imprisonment for more than one year the prosecution shall be in the Supreme Court of the District. When the maximum punishment is a fine only or imprisonment for one year or less the prosecution may be in the Police Court."
>
> Code, D. C., sec. 934.

And, respecting appeals from the Police Court, the provisions of law presently material are as follows:

> "If, upon the trial of any cause in the Police Court, an exception be taken . . . the same shall be reduced to writing and stated in a bill of exceptions . . .; and, if, upon presentation to any justice of the Court of Appeals of the District of Columbia of a petition . . . setting forth the matter or matters so excepted to, such justice shall be of opinion that the same ought to be reviewed, he may allow a writ of error in the cause."
>
> Code, D. C., 227.

And Section 1042, R. S. U. S., decided by the Court of Appeals of the District of Columbia, in U. S. *vs.* Mills, 11 App. D. C., 500, not to be applicable to the Police Court, is as follows:

> "When a poor convict, sentenced by any court of the United States to pay a fine, or fine and cost, whether with or without imprisonment, has been confined in prison thirty days, solely for the nonpayment of such fine, or fine and cost, he may

make application in writing to any commissioner of the United States court in the district where he is imprisoned, setting forth his inability to pay such fine, or fine and cost, and after notice to the district attorney of the United States, who may appear, offer evidence and be heard, the commissioner shall proceed to hear and determine the matter, and if on examination it shall appear to him that such convict is unable to pay such fine, or fine and cost, and that he has not any property exceeding twenty dollars in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: 'I do solemnly swear that I have not any property, real or personal, to the amount of twenty dollars, except such as is by law exempt from being taken on civil precept for debt by the laws of (state where oath is administered), and that I have no property in any way conveyed or concealed, or in any way disposed of, for my future use or benefit. So help me God.' And thereupon such convict shall be discharged, the commissioner giving to the jailer or keeper of the jail a certificate setting forth the facts."

R. S. U. S., sec. 1042.

These respective provisions of the Food and Drugs Act, of the Code of Law for the District of Columbia, and of the Revised Statutes of the United States, clearly establish the following propositions:

(1) The jurisdiction of the Police Court of the District of Columbia is limited to cases involving punishment by fine only, or imprisonment not exceeding one year, and does not extend to any case involving punishment by fine and imprisonment, or by fine and a penalty additional to, and in excess of the fine.

(2) Prosecutions in the Police Court of the District of Columbia for offenses under penal statutes in the nature of police regulations, and involving punishment

by fine only must, and can only, be conducted in the name of the District of Columbia, and by its counsel, whereas the Food and Drugs Act, by section 5 above quoted, contemplates and provides for prosecution for any violation of the act in the name, and by an attorney, of the United States only.

(3) One accused and convicted in the Police Court of the District of Columbia of such an offense as that under consideration has no right of appeal, as of course, from his conviction, whereas one so accused and convicted in any other court has such right, and,

(4) One convicted and fined in the Police Court of the District of Columbia, and sentenced to imprisonment in default of payment of the fine, has not the right and remedy of being released from such imprisonment in accordance with the provisions in that behalf of section 1042 of the Revised Statutes of the United States, whereas one so convicted and imprisoned by the sentence of any other court of the United States has such right and remedy.

So plainly incontrovertible do these propositions seem to be that discussion of them might well be pretermitted, but, out of abundant caution, the following suggestions are presented:

(1) The Police Court, being a court of inferior and limited jurisdiction, can not, either by implication or consent, claim or acquire any other or further jurisdiction; and the manner of proceeding therein, being plainly prescribed by law, can not be altered or varied in any manner or upon any pretext.

And very clearly the penalty of a violation, even by first offense, of any provision of the Food and Drugs Act is not limited to fine, but involves the grave consequence of official public proclamation and stigmatiza-

tion of the offender, in accordance with the following provision of section 4 of the act:

> "After judgment of the court notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid,"

meaning the rules and regulations by section 3 of the act prescribed.

The application and execution of this provision of the Food and Drugs Act were brought to the attention of the Court of Appeals of the District of Columbia in the case of Huyler's *vs.* Houston, 41 App. D. C., 452, further considered hereinafter; and the departmental regulation respecting publication, prescribed as aforesaid, is as follows:

> "(*a*) When a judgment of the court shall have been rendered there may be a publication of the findings of the examiner or analyst, together with the findings of the court.
>
> "(*b*) This publication may be made in the form of circulars, notices, or bulletins, as the Secretary of Agriculture may direct, not less than thirty days after judgment.
>
> "(*c*) If an appeal be taken from the judgment of the court before such publication, notice of the appeal shall accompany the publication."

That the statute does not provide that the judgment of the court shall direct the contemplated publication is immaterial to the question whether the publication is part of the penalty following conviction; the fact that such publication is provided by the statute to follow conviction of itself makes the publication part of the penalty.

Where, in addition to a penalty prescribed to be imposed by a court for a given offense, the act defining the offense and prescribing its penalty provides that the conviction shall be followed by forfeiture of a right or

privilege, such forfeiture, though not included in the judgment or sentence of the court, is as much part of the penalty as though it were so included.

Thus, where, in prescribing the penalty of a fine or imprisonment for unlawfully permitting a minor to play pool, the statute provided that the offender should, in addition, forfeit the right and privilege of again keeping a pool table, it was held that the incident of forfeiture must be regarded as part of the punishment in determining the question of the jurisdiction of the court; and it was, accordingly, held that, as the jurisdiction of the court was confined to a prescribed maximum penalty of fine or imprisonment, it was without jurisdiction to try such a case.

Klyman *vs.* Comm., 97 Ky., 484.

In this case the judgment or sentence of the court did not adjudicate or declare the forfeiture, but the court, deeming that immaterial, said (p. 486):

> "As the effect of the judgment was to deprive the accused of his right and privilege of again keeping pool tables, the penalty *imposed by the statute* was beyond the jurisdiction of the court."

To the same effect are the cases of Cheek *vs.* Comm., 87 Ky., 42, and Johnson *vs.* Comm., 90 Ky., 53, in the former of which the court (p. 46) characterized the penalty attached in addition to the punishment imposed as "a badge of disgrace and infamy."

And under a statute making disfranchisement, etc., a consequence of conviction of bribery at an election, the court, dealing with the question of the effect of this upon the jurisdiction of the trial court, said:

> "The question is not simply whether the punishment imposed exceeds that to which the city court is restricted by the charter, but whether the case is one for which a greater punishment is

provided by the general law. What, then, is the extent of the punishment provided by the general law?

"It not only denounces a fine of $500 but goes further and provides that the offender, after conviction, shall be deemed infamous, and be forever thereafter disqualified from exercising the right of suffrage, and from holding any office of honor, trust, or profit. And this disfranchisement, disqualification, and infamy *follow* a judgment of conviction and *attach* to it as its *legal* consequences and effects.

"We are, therefore, of opinion that said city court had no jurisdiction of the offense with which the appellants were charged."

Flynn et al. *vs.* Comm., 2 Bush (Ky.), 590, 593-4.

The Court of Appeals of the District of Columbia has aptly, tersely, and comprehensively said:

"It is well settled that under a statute authorizing a justice of the peace, police judge, or other magistrate with limited jurisdiction to fine and imprison, he has no jurisdiction to try a criminal case punishable by fine and imprisonment. If the offense be one the maximum penalty or punishment of which exceeds the power of his court to impose, he is without jurisdiction."

D. C. *vs.* Simpson, 40 App. D. C., 498.

Inasmuch as the penalty, for even a first offense, under the provision of the Food and Drugs Act in question has attached to it as a legal consequence and effect the publication prescribed, which publication is to follow, even though there be pending an appeal in which the conviction may be reversed, it would seem too plain for argument that this additional "penalty imposed by the statute," or, as it is otherwise said "provided by the general law," and affixing to the accused "a badge of

disgrace," is such as to oust the Police Court of jurisdiction in the premises.

(2) That the Food and Drugs Act does not contemplate the Police Court of the District of Columbia as one of the "proper courts of the United States" mentioned therein, is evident from the fact that, whereas prosecutions in that court for offenses under penal statutes in the nature of police regulations and involving punishment by fine only must, and can only, be conducted in the name of the District of Columbia, and by its counsel, the act clearly contemplates and provides for prosecution for any violation of its provisions in the name, and by an attorney, of the United States only.

That the Food and Drugs Act is a penal statute in the nature of police regulation can not be doubted; the title of the act, its object and provisions clearly so indicate, and the Court of Appeals of the District of Columbia has uniformly so held.

See, for example, the case of Dade *vs.* U. S., 40 App. D. C., 94, in which the language of the court is (p. 97):

> "The pure food and drugs act is a police regulation enacted to conserve the public health."

And see, also, the case of U. S. *vs.* Capital Traction Company, 38 App. D. C., 471, in which it is held that the Act of Congress of May 23, 1908 (35 Stat. L., 246), providing in terms that prosecutions for violation of any of its provisions—

> "shall be on information of the Interstate Commerce Commission filed in the Police Court of the District of Columbia by or on behalf of the Commission,"

being in the nature of a police or municipal regulation and the penalty for an offense thereunder being a fine only, the prosecution must be in the name of the District of Columbia.

And the body enacting the act, namely, the Congress of the United States, being conclusively presumed to have in mind all of its own enactments having possible bearing upon the subject treated, it is, accordingly, an irresistible inference and conclusion that it did not intend prosecutions under the act to be in a court the manner of conducting prosecutions in which, by that body's own clear prescription, is exclusive of the right in question.

(3 & 4) In any other court of the United States than the Police Court of the District of Columbia, one accused and convicted of such an offense as that under consideration has both the absolute right of appeal, and also "to take the poor convict oath," as the expression is, and thereby obtain the benefit of the provisions of section 1042, R. S. U. S., to neither of which rights is one so accused and convicted in the Police Court entitled.

The obvious result of this is, that to contend that the Police Court has the jurisdiction invoked is to say that the Food and Drugs Act may be given greater punitive force and effect in the District of Columbia than elsewhere; that the Police Court of the District of Columbia has greater jurisdiction and power in the administration of the act than is or could be had and exercised by any other court within the United States; that the act may be made to operate unequally upon persons within and those without the District of Columbia, and that the former may be denied equal protection of the law with the latter. To state this contention is to confute it; to argue it would be unduly to dignify it.

And, if Congress had designedly enacted that offenders against the Food and Drugs Act in the District of Columbia should be tried in the Police Court of the District, and like offenders elsewhere should be tried in other

courts, in which the rights of accused would be greater—as in the particulars of the right of appeal and the right to take the "poor convict oath"—its enactment, as to the District of Columbia, would be void as discriminating against residents of the District and denying them the equal protection of the law.

This is true in principle, and is illustrated in a well-considered case in Michigan. By the act creating it, the Police Court of Grand Rapids, a court of defined limited jurisdiction, was given jurisdiction of all offenses not punishable by imprisonment in the penitentiary, but, in respect of challenging jurors, the rights of one accused in that court were more restricted than those of one accused in a county court of the State. The offense of selling liquor on Sunday was, as to the penalty prescribed, within the jurisdiction of the Police Court of Grand Rapids, and also of the county courts throughout the State. The Supreme Court of the State held that the discrimination between accused in the particular mentioned did not give equal protection to those within and those without Grand Rapids, and that for this reason the Police Court had not jurisdiction of the offense.

Peo *vs.* Mangold, 71 Mich., 335.

This case is directly pertinent, and it is interesting to note that the question of jurisdiction was first raised on a motion for rehearing, after the appeal of the accused had been heard and his conviction affirmed—on the universally recognized principle that the question of jurisdiction is always open to consideration pending the case in which it is raised, and however it may be raised.

Against the contention here made that the Police Court of the District of Columbia is not one of the "proper courts of the United States," within the meaning

of the Food and Drugs Act, as aforesaid, counsel for the United States and the learned justice presiding in the Supreme Court of the District of Columbia opposed the decision of the Court of Appeals of the District of Columbia in the case of Huyler's *vs.* Houston, 41 App. D. C., 452, above mentioned, the learned justice, in the course of his opinion quashing the petitioner's writ of certiorari (Rec., p. 21, fol. 21), and also at its conclusion (Rec., p. 22, fol. 22), stating that he felt bound by that decision.

In the preparation of this brief counsel for the petitioner have carefully examined the record and briefs, as also the opinion of the court, in the Huyler case, and are respectfully constrained to submit that the decision in the case is not conclusive and should not be held binding in the premises.

The Huyler case was a suit in equity in which the plaintiff, a corporation, which had been convicted in the Police Court of the charge of selling adulterated maple sugar (the information was in two counts, one charging adulteration and one charging misbranding, the verdict and judgment on the former being guilty, and on the latter not guilty), filed its bill in the Supreme Court of the District of Columbia against the Secretary of Agriculture seeking to enjoin him from making publication of the notice of judgment in conformity with the regulation hereinbefore set forth. The pertinent allegations of the bill are as follows:

> "That plaintiff is advised that the said Act of Congress is a lawful one, but that a true and proper construction thereof excludes the jurisdiction of the Police Court of the District of Columbia, it not being a court of the United States within the meaning and proper interpretation of the said Act of Congress, from jurisdiction to try and determine the offense alleged under said act, or from any jurisdiction whatsoever, in

> regard to the enforcement of the terms thereof. . . . That the prosecution in said court is in direct violation of the said Act of Congress, which provides that all prosecutions under the said act shall be in the proper courts of the United States, *thereby meaning a Constitutional Court of the United States*, and is a denial of the Constitutional rights of the plaintiff, which, as a body corporate of the State of New York, is entitled to a trial in a Constitutional Court."

In his answer to a rule to show cause issued upon the the bill, the Secretary of Agriculture set forth certain matters and things in the light whereof he averred that the question of jurisdiction in the case was *res adjudicata* and that he was advised that the allegations concerning the jurisdiction of the Police Court were a mere conclusion of law which he was not called upon to answer. He also, at the same time, filed a demurrer to the bill, but the record in the case did not otherwise present the question under consideration than as above appears.

The bill of complaint was dismissed by the trial court, and the plaintiff appealed, assigning but three errors, as follows:

> "I. The court erred in holding that the Police Court is a proper court of the United States within the meaning of the Pure Food and Drugs Act of June 30, 1906.
>
> "II. The court erred in holding that the Police Court of the District of Columbia is a Constitutional Court of the United States which court is intended to be named as the proper court of the United States by the said Foods and Drugs Act of June 30th, 1906.
>
> "III. The court erred in sustaining the demurrer to the bill of complaint and ordering the dismissal of the said bill."

In the brief for appellant counsel contended, as to the Police Court, only that it "is not a proper court of

the United States, or in any sense a court of the United States," relying for the contention solely upon the argument that it is not a court of the United States within the meaning and contemplation of the Constitution and of the laws of Congress creating and dealing with courts of the United States by that designation, and summing up the matter in these words:

> "In the light of the decisions culminating in the decision of the Hof case in 174 U. S., it is respectfully submitted that the Police Court is not an inferior court of the United States, but that the judges of such court are in some sense legislative judicial officers."

While in the brief for the United States counsel exceeded somewhat the limits of the discussion as set by counsel for the appellant, the brief of the former did not present or discuss the grounds hereinabove presented in support of the present contention that the Police Court is not one of the "proper courts of the United States," as above considered; and in the brief opinion of the court disposing of the case, no reference thereto or discussion thereof is discovered. In the opinion says the court:

> "It is the contention of the appellant that the Police Court is not a proper court of the United States within the meaning of said sec. 5 of the Food and Drugs Act."

But it does not state the ground of this contention, which, as hereinbefore shown, is that that court is not "*a* court of the United States," and that in using the expression "proper court of the United States" the Food and Drugs Act meant "a constitutional court of the United States." And the opinion concludes thus:

> "The question here is not whether the Police Court is a court of the United States in the constitutional sense, but whether it is a 'proper court

> of the United States,' within the meaning of the Food and Drugs Act. All other petty offenses against the United States, except those expressly reserved from its jurisdiction, are triable in that court, and no reason is perceived why one accused of adulterating food in this District is entitled to treatment different than would be accorded him if accused of some other petty offense against the laws of the United States. When, therefore, Congress used the words 'in the proper courts of the United States,' we think it clear that it meant in the courts having jurisdiction of similar offenses. The Police Court was therefore a proper court within the meaning of this section."

As is obvious, this utterance at no point touches the contentions now made, and the expression—

> "and no reason is perceived why one accused of adulterating food in this District is entitled to treatment different than would be accorded him if accused of some other petty offense against the laws of the United States,"

may respectfully be put into juxtaposition with the proposition hereinabove earnestly contended for, that no reason may be perceived why any one accused of adulterating food in this District should be subjected to treatment different than would be accorded to one so accused outside of the District.

And it may likewise respectfully be suggested that the question under consideration does not turn, and can not be made to turn, upon the inquiry whether "one accused of adulterating food in this District is entitled to treatment different than would be accorded him if accused of some other petty offense against the laws of the United States," the question being whether the tribunal in which he is attempted to be subjected to such treatment is the one entitled to administer it. The Police Court of the District of Columbia is expressly

excluded from jurisdiction over cases involving violation of the post-office and pension laws of the United States. Suppose Congress to create an offense against the post-office or pension laws involving the penalty of fine only, would it be contended that, in face of this specific exclusion of jurisdiction, the Police Court could try a case arising under such an enactment?

And it is deferentially submitted that it was an inadvertence on the part of the court to characterize the offense under consideration as a "petty offense against the United States." So far to the contrary is the view of the law-making power creating the offense that it has attached thereto the extraordinary and degrading punishment of denunciation of the offender as an adulterator of food intended for consumption by the public, and constituted the sovereign of the land the agency of making proclamation throughout the country of the guilt of the offender, using in that behalf its potent, multiform, and ubiquitous instrumentalities to the end of affixing to the offender "a badge of disgrace" beside which many another stigmatization might well be deemed a decoration, and in comparison with the punishment by which the imposition of the maximum fine might fairly seem the utmost stretch of leniency.

The contentions and considerations here presented were not before the court in the Huyler case, and to them the merited attention of the court is earnestly requested.

2. Assuming the Police Court of the District of Columbia to be a "proper court of the United States" to try an information against an accused for violating the Food and Drugs Act, that court may yet not try such an information on which its sentence may involve punishment in the penitentiary.

Counsel for the petitioner are not unmindful of the fact that certain aspects of this proposition have had the attention of the Supreme Court of the District of Columbia and the Court of Appeals of the District, and assume that counsel for the respondent will contend that discussion of the question is foreclosed. It remains, however, the duty of counsel to present the following considerations, apparently to counsel conclusive of the soundness of the proposition stated.

The Code of Law for the District of Columbia, sec. 934, above quoted, in terms provides as follows:

> "When any person is sentenced for a term longer than six months and not longer than one year, such imprisonment *shall* be in the jail, and where the sentence is imprisonment for more than one year, it *shall* be in the penitentiary. Cumulative sentences aggregating more than one year *shall* be deemed one sentence for the purposes of the foregoing provision."

Ex vi termini, the expression "cumulative sentences" postulates a prosecution and trial of more than one offense; there can not be more than one sentence for one offense. It unanswerably follows that this provision of the Code was industriously intended to mean, and means only, that whenever, on a prosecution in the District of Columbia, the penitentiary is in sight of the accused, it must also be in sight of the court trying him; and as, to use a colloquialism, the Police Court can not "see the penitentiary," it may not try one whose punishment may land him in that institution.

And it is beside the question to say that when the Police Court is trying one accused of several separate and distinct offenses, its jurisdiction is to be determined by the fact that each of the offenses, tried separately, would be within such jurisdiction; for that jurisdiction is made to depend upon the effect of conviction—it was not the intention of Congress, but just the contrary, to confide to

the inferior court, the Police Court, the power to punish offenders by imprisonment in the penitentiary; the law-making power was considering as much the character and dignity of the court inflicting, as the amenability of offenders receiving, so grave a punishment.

The question involved is enlightened by the decisions of courts in analogous cases.

A law of Kentucky made it an offense to maintain a fence across a public highway, and prescribed a penalty of $1 a day for so doing. Another law of the State gave justices of the peace jurisdiction of all offenses the punishment for which was less than a fine of $10. A charge of maintaining such a fence for 150 days was held without the jurisdiction of a justice of the peace, as the penalty to follow was beyond that which he might impose.

Comm. *vs.* Mills, 69 Ky., 296.

The Constitution of North Carolina limited the jurisdiction of justices of the peace in criminal matters to cases in which the fine might not exceed $50, or the imprisonment thirty days. A statute of the State punished the offense of allowing hogs to run at large by a fine of not more than $10 for each hog. A justice of the peace was held without jurisdiction of a case charging the accused with allowing eight hogs to run at large, the court saying:

> "This statute makes a violation of section 1 a misdemeanor, and does not prescribe any punishment, except as to each hog. But Article IV, Section 27, of the Constitution fixes the jurisdiction of Justices of the Peace, and limits it in criminal matters to cases in which the fine *can not exceed fifty dollars*, or the imprisonment thirty days. And under this statute the fine is limited to ten dollars for each hog—'the fine shall not exceed ten dollars for each hog allowed to run at

> large.' And, although he was only fined two dollars a hog, or sixteen dollars for the eight, he *might have been* fined as much as eighty dollars, this being thirty dollars in excess of his jurisdiction. It is therefore plain to see that the Justice of the Peace did not have jurisdiction."
>
> State *vs.* Wiseman, 131 N. C., 795, 796.

This is in strict accord with the only true, and universally recognized, principle that the jurisdiction of a court is to be determined by what it *may* do in a given case—saving the observation of the learned justice below in this case (Rec., p. 22, fol. 22), that the contention of counsel for the petitioner does not seem logical,

> "for it would seem to anticipate a conviction on more than one count, and an effort on the part of the court to go beyond its jurisdiction in the assessment of fines and imprisonment."

The reply to this—superfluous though it may seem—obviously is, that on a trial of the information in question, the Police Court *might* find the petitioner guilty on every one of the seven counts, and *might* sentence him to pay a fine of $200 on each count, and to be imprisoned for one year on account of each fine unless it were paid; and *might* make the sentences cumulative, so as to constitute one sentence of seven years, which the law says would have to be served in the penitentiary—to which institution the vision of the Police Court can not by law extend, and from which the petitioner could not save himself by taking the "poor convict oath."

Respectfully submitted.

HENRY E. DAVIS,
MATTHEW E. O'BRIEN,
Attorneys for Plaintiff in Error.

WALTER JEFFREYS CARLIN,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

WILLIAM A. HARTRANFT, PLAINTIFF IN ERROR,
v.
ALEXANDER R. MULLOWNY, JUDGE OF the Police Court of the District of Columbia.

No. 855.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION BY THE UNITED STATES TO DISMISS OR AFFIRM, AND BRIEF IN SUPPORT.

The Solicitor General, on behalf of the respondent, moves the Court to dismiss or affirm the above-entitled cause.

STATEMENT OF CASE.

An information was filed in the Police Court of the District of Columbia against William A. Hartranft for selling adulterated milk in violation of the Food and Drugs Act. Defendant attacked the jurisdiction of the Police Court by motion to quash, by demurrer and by special plea in bar, all of which were successively overruled.

Thereupon defendant, before trial upon the merits, filed in the Supreme Court of the District of Columbia a petition for a writ of certiorari, averring that the Police Court was without jurisdiction (1) because said court was not a "proper court" within the meaning of section 5 of the Food and Drugs Act, and (2) because the maximum sentence authorized by law for the alleged violations of the act exceeded in the aggregate the maximum penalty said court was authorized to impose. (Classification adopted from defendant's brief in Court of Appeals.)

The writ of certiorari was granted, but on motion of the Government was quashed and the case remanded to the Police Court for trial. An appeal from the judgment quashing the writ was taken by defendant to the Court of Appeals of the District, which affirmed the ruling of the Supreme Court. Defendant then sued out the present writ of error, by which it is sought to bring the case to this Court for review.

I.

The writ of error should be dismissed because this is a case arising under the criminal laws.

The Judicial Code, in section 250, provides:

> Except as provided in the next succeeding section, the judgments and decrees of said Court of Appeals shall be final in all cases arising under the patent laws, the copyright laws, the revenue laws, the criminal laws, and in admiralty cases.

The words "cases arising under the criminal laws" are broader than the expression "criminal cases." This Court, in construing these words in the act of March 3, 1891, chapter 517, section 6 (26 Stat., 828), held:

> A writ of scire facias upon a recognizance to answer to a charge of crime, even if it be, technically considered, a civil action, and only incidental and collateral to the criminal prosecution, is certainly a case arising under the criminal laws. (*Hunt* v. *United States*, 166 U. S. 424, 426.)

In the present case the information charges defendant with violating section 7, paragraph 6, of the Food and Drugs Act of June 30, 1906, chapter 3915, 34 Statutes, 768,769. Violations of this act are misdemeanors. The petition for certiorari, like the pleadings in the Police Court, attacks the jurisdiction of that court over the crimes alleged.

It is submitted that this is a "case arising under the criminal laws" in which the judgment of the Court of Appeals of the District of Columbia is made final and that the writ of error should therefore be dismissed. *United States ex rel. Chott* v. *Ewing*, decided April 12, 1915; *Gompers* v. *United States*, 233 U. S., 604.

II.

The writ of error should be dismissed because the decision appealed from is not a final judgment.

Even if this Court had jurisdiction over cases arising under the criminal laws, still this case would not be now reviewed because no final judgment has been rendered.

Section 250 of the Judicial Code provides that only a "final judgment or decree" of the Court of Appeals may be brought here by writ of error or appeal. This Court, in a case on appeal from the Court of Appeals of the District of Columbia thus laid down the rule as to what are final judgments:

> The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered. (*Macfarland* v. *Brown*, 187 U. S., 239, 246.)

The case of *Heike* v. *United States*, 217 U. S., 423, 429, is to the same effect.

A ruling to the effect that the trial court has jurisdiction and that the case must proceed on its merits is not a final decree. *McLish* v. *Roff*, 141 U. S., 661.

The present case falls clearly within these rulings, since the Court of Appeals merely held that the Police

Court had jurisdiction and remanded the case to that court for trial.

> It may be that upon trial the defendant will be acquitted on the merits. It may happen that for some reason the trial will never take place. In either of these events there can be no conclusive judgment against the defendant in the case. (*Heike* v. *United States*, 217 U. S. 423, 430.)

The certiorari proceedings are not a new case, but a form of appeal in the criminal case. *Degge* v. *Hitchcock*, 35 App. D. C., 218, 226.

The writ of certiorari was granted by the Supreme Court of the District under authority of section 68 of the Code of Law of the District of Columbia, which provides:

> The said Supreme Court may . . . issue writs of . . . certiorari . . . and all other writs known in common law and equity practice that may be necessary to the effective exercise of its jurisdiction.

This section is similar in scope to section 716 of the Revised Statutes. The writ of certiorari granted under section 716 of the Revised Statutes is essentially a proceeding for review. *McClellan* v. *Carland*, 217 U. S., 268, 278; *In re Chetwood*, 165 U. S., 443, 462.

> There is no statute prescribing the functions of, or regulating the procedure by, certiorari in the District of Columbia, hence we must look, therefor, to the common law. The writ has

to inferior courts and to special tribunals exercising judicial or quasi judicial functions, to bring their proceedings into the superior court, where they may be reviewed and quashed if it be made plainly to appear that such inferior court or special tribunal had no jurisdiction of the subject-matter, or had exceeded its jurisdiction, or had deprived a party of a right or imposed a burden upon him or his property, without due process of law. (*Degge* v. *Hitchcock*, 35 App. D. C., 218, 226.)

III.

The judgment should be affirmed, because the decision of the Court of Appeals is obviously correct.

If this Court should conclude that it has jurisdiction, the decision of the Court of Appeals should be affirmed, because manifestly correct.

The defenses pleaded were:

1. That the Police Court of the District of Columbia was without jurisdiction because not a "proper court" within the meaning of section 5 of the Food and Drugs Act.

The reasoning of the Court of Appeals in *Hugler's* v. *Houston*, 41 App. D. C., 452, 455, is a complete answer to this defense:

> The question here is not whether the police court is a court of the United States in the constitutional sense, but whether it is a "proper court of the United States," within the meaning of the Food and Drugs Act. All other petty offenses against the United States, except those expressly reserved from its juris-

diction, are triable in that court, and no reason is perceived why one accused of adulterating food in this District is entitled to treatment different than would be accorded him if accused of some other petty offense against the laws of the United States. When, therefore, Congress used the words "in the proper courts of the United States," we think it clear that it meant in the courts having jurisdiction of similar offenses. The police court was therefore a proper court within the meaning of this section.

With reference to the objection that the information should have been prosecuted in the name of the District of Columbia, it is enough to say that prosecutions under the Food and Drugs Act must be conducted by the United States Attorney, and so in the name of the United States. (Food and Drugs Act, sec. 5; Code of Law, District of Columbia, sec. 932.)

2. That the Police Court did not have jurisdiction to try the case, because the maximum sentence that it might impose for the seven alleged violations of the act, a fine of $1,400 or, in default of payment, imprisonment for seven years, exceeds in the aggregate the maximum penalty that the Police Court is authorized to impose.

In this case the maximum penalty authorized by law for each offense charged in the information, is within the maximum penalty that the Police Court is empowered to impose. The aggregate of maximum fines authorized in this case would not exceed

the amount the Police Court may impose. The Food and Drugs Act provides for no penalty except the payment of fine. Defendant, therefore, could be imprisoned, if at all, only for failure to pay the fines imposed. "The provision of section 934, D. C. Code (31 Stat. 1341, c. 854), relating to cumulative sentences (providing also that the prosecution may be in the Police Court, when the maximum punishment is a fine only, or imprisonment for one year or less) has no reference to a sentence to pay a pecuniary fine, followed by imprisonment in default of payment, but only to cases in which the punishment is to be imprisonment." *Harris* v. *Lang*, 27 App. D. C. 84 (Syllabus. Parenthesis ours.)

This question is premature. An appellate court will not assume that the trial court will exceed its power in imposing a sentence. The proper time to raise this question is when the court attempts, if ever, to impose such sentence. *United States* v. *Pridgeon*, 153 U. S., 48.

For the reasons stated it is respectfully submitted that the writ of error should be dismissed or the decision of the Court of Appeals affirmed.

JOHN W. DAVIS,
Solicitor General.

MAY, 1915.

HARTRANFT *v.* MULLOWNY, JUDGE OF THE POLICE COURT OF THE DISTRICT OF COLUMBIA.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 19. Argued February 23, 1916; restored to docket for reargument November 13, 1916; reargued November 7, 8, 1917.—Decided June 3, 1918.

Under Jud. Code, § 250, judgments of the Court of Appeals of the District of Columbia in criminal cases, and judgments which are not final, are not reviewable by writ of error upon the ground that the jurisdiction of the trial court is in issue, or upon the ground that the construction of a law of the United States was brought in question by the defendant.

The jurisdiction of the Supreme Court of the District of Columbia to supervise the criminal proceedings of inferior tribunals by removal and review through certiorari, is analogous to that of the Court of King's Bench; and the nature and functions of the writ in such cases are to be tested by common-law principles.

At common law, when a cause before judgment was removed by certiorari in order that justice might be done by quashing the indictment or information or proceeding to trial, or otherwise, as the circumstances might require, the nature of the cause was not changed by the removal and a judgment quashing the writ was followed by a *procedendo* as a matter of course.

The Supreme Court of the District, having by certiorari removed for consideration a criminal case from the local police court upon a petition alleging want of jurisdiction and insufficiency of the information, afterwards entered judgment that the writ be quashed, the

petition dismissed, and the record "remanded" to the police court "whence it came." This judgment having been appealed to and affirmed by the Court of Appeals, *Held:* (1) That the judgment was in a case arising under the criminal laws; (2) that it was not final; and (3) that for these reasons a writ of error under Jud. Code, § 250, would not lie.

Writ of error to review 43 App. D. C. 44, dismissed.

THE case is stated in the opinion.

Mr. Matthew E. O'Brien and *Mr. Henry E. Davis*, with whom *Mr. Walter Jeffreys Carlin* was on the briefs, for plaintiff in error.

Mr. Assistant Attorney General Frierson for defendant in error.[1]

MR. JUSTICE PITNEY delivered the opinion of the court.

On April 17, 1914, an information in behalf of the United States was filed by the United States attorney in the police court of the District of Columbia against the plaintiff in error (who will be called the petitioner) charging violations of the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768. Having first objected to the jurisdiction of the police court by motion to quash, by demurrer, and by special plea in bar, all of which were overruled by that court, petitioner was arraigned upon the information and pleaded not guilty, after which, and before trial on the merits, he filed in the supreme court of the District a petition praying that a writ of certiorari might issue from that court to the present defendant in error as judge of the police court to bring up the record and proceedings, upon the grounds (1) that the police court was without jurisdiction to try petitioner upon the infor-

[1] *Mr. Assistant Attorney General Underwood* argued the case for the defendant in error at the first hearing.

mation, for several reasons specified, and (2) that the information did not sufficiently inform petitioner of the nature and cause of the accusation against him, and his trial thereon would deprive him of his constitutional right in that behalf. The writ of certiorari was issued as prayed, return was made setting forth the information and a memorandum of the proceedings thereon, and afterwards a motion was made in the supreme court by the United States attorney, in the name of the respondent, to quash the writ because the police court had jurisdiction and had assumed jurisdiction of the cause of action involved in the information. Upon consideration the supreme court granted this motion, petitioner appealed to the court of appeals of the District, that court affirmed the judgment of the supreme court (43 App. D. C. 44), and to review the judgment of affirmance the present writ of error was sued out.

At the threshold we are confronted with the question whether we have jurisdiction to proceed under the latter writ. If we have, it must arise under § 250, Judicial Code (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1159), which, so far as need be quoted, runs as follows: "Any final judgment or decree of the court of appeals of the District of Columbia may be reëxamined and affirmed, reversed or modified by the Supreme Court of the United States, upon writ of error or appeal in the following cases:" specifying, among others, "cases in which the jurisdiction of the trial court is in issue," and "cases in which the construction of any law of the United States is drawn in question by the defendant;" and then proceeding: "Except as provided in the next succeeding section, the judgments and decrees of said court of appeals shall be final in all cases arising under the patent laws, the copyright laws, the revenue laws, the criminal laws, and in admiralty cases." The succeeding section confers upon this court the discretionary power to review, by certiorari

or otherwise, judgments and decrees of the court of appeals otherwise made final by § 250.

Our jurisdiction is invoked upon the ground that the police court has not jurisdiction to try the information, and that the construction of the Food and Drugs Act, a law of the United States, is drawn in question by plaintiff in error, who was defendant below. The motion to dismiss is based upon the twofold ground that the case is one arising under the criminal laws, and that the judgment of the court of appeals is not a final judgment within the meaning of the opening words of § 250. If the case is one so arising, or if the judgment is not final, the fact that the jurisdiction of the police court, or the construction of a law of the United States, is in question, will not give us jurisdiction. *Chott* v. *Ewing*, 237 U. S. 197, 201; see *McLish* v. *Roff*, 141 U. S. 661. It is conceded by petitioner that the information in the police court presents a case arising under the criminal laws within the meaning of the section, and that this has not proceeded to final judgment; the response to the motion to dismiss being that the proceeding by certiorari in the supreme court of the District was a separate and independent proceeding, not arising under the criminal laws, and that this has been finally concluded by the affirmance in the court of appeals of the judgment of the supreme court, leaving nothing to be done except the issuing of execution for costs.

Whether it was a separate and independent proceeding must be determined by a consideration of the nature and office of the writ of certiorari, as employed in this case, and its relation to the criminal proceeding.

The only provision of the District of Columbia Code respecting this form of writ is in § 68 (Act of March 3, 1901, c. 854, 31 Stat. 1189, 1200), which provides: "The said supreme court may, in its appropriate special terms, issue writs of quo warranto, mandamus, prohibition, scire facias, certiorari, injunction, prohibitory and mandatory,

no exeat, and all other writs known in common law and equity practice that may be necessary to the effective exercise of its jurisdiction." Act of March 3, 1901, c. 854, 31 Stat. 1189, 1200.

Certiorari always has been recognized in the District as an appropriate process for reviewing the proceedings of a subordinate tribunal when it has proceeded, or is proceeding, to judgment without lawful jurisdiction. *Kennedy* v. *Gorman*, 4 Cranch C. C. 347; Fed. Cas. No. 7702; *Bates* v. *District of Columbia*, 1 Mac A. 433, 449. And the power to employ the writ inheres in the supreme court of the District as possessing a general common law jurisdiction and supervisory control over inferior tribunals, analogous to that of the king's bench. *United States* v. *West*, 34 App. D. C. 12, 17. The court of appeals, in a recent case, declared: "There is no statute prescribing the function of, or regulating the procedure by, certiorari in the District of Columbia, hence we must look, therefor, to the common law. The writ lies to inferior courts and to special tribunals exercising judicial or quasi judicial functions, to bring their proceedings into the superior court, where they may be reviewed and quashed if it be made plainly to appear that such inferior court or special tribunal had no jurisdiction of the subject-matter, or had exceeded its jurisdiction, or had deprived a party of a right or imposed a burden upon him or his property, without due process of law." *Degge* v. *Hitchcock*, 35 App. D. C. 218, 226; affirmed 229 U. S. 162, 170.

At the common law certiorari was one of the prerogative or discretionary writs by which the court of king's bench exercised its supervisory authority over inferior tribunals, and it was employed in three classes of cases, among others, viz.: (1) to bring up an indictment or presentment before trial in order to pass upon its validity, to take cognizance of special matters bearing upon it, or to assure an impartial trial; if the accused was in cus-

tody, it was usual to employ a *habeas corpus* as a companion writ; (2) as a *quasi* writ of error to review judgments of inferior courts of civil or of criminal jurisdiction, especially those proceeding otherwise than according to the course of the common law and therefore not subject to review by the ordinary writ of error; and (3) as an auxiliary writ in aid of a writ of error, to bring up outbranches of the record or other matters omitted from the return.

The first of these functions is the one that now concerns us. Blackstone refers to it in these terms: "Thus much for process to bring in the offender after indictment found; during which stage of the prosecution it is, that writs of *certiorari facias* are usually had, though they may be had at any time before trial, to certify and remove the indictment, with all the proceedings thereon, from any inferior court of criminal jurisdiction into the court of king's bench; which is the sovereign ordinary court of justice in causes criminal. And this is frequently done for one of these four purposes; either, 1. To consider and determine the validity of appeals or indictments and the proceedings thereon; and to quash or confirm them as there is cause: or, 2. Where it is surmised that a partial or insufficient trial will probably be had in the court below, the indictment is removed, in order to have the prisoner or defendant tried at the bar of the court of king's bench, or before the justices of *nisi prius*: or, 3. It is so removed, in order to plead the king's pardon there: or, 4. To issue process of outlawry against the offender, in those counties or places where the process of the inferior judges will not reach him. Such writ of *certiorari*, when issued and delivered to the inferior court for removing any record or other proceeding, as well upon indictment as otherwise, supersedes the jurisdiction of such inferior court, and makes all subsequent proceedings therein entirely erroneous and illegal; unless the court of king's bench remands the record to

the court below, to be there tried and determined." 4 Black. Com. 320, 321. To the same effect is 2 Hale P. C. 210, where the learned commentator further says: "If there be an indictment to be removed and the party be in custody, it is usual to have an *habeas corpus* to remove the prisoner, and a *certiorari* to remove the record, for as the *certiorari* alone removes not the body, so the *habeas corpus* alone removes not the record itself, but only the prisoner, with the cause of his commitment," etc. See also Fits. Nat. Brev. 245; Bacon's Abr., tit. Certiorari (A); *Harris* v. *Barber*, 129 U. S. 366, 369.[1]

The function of the writ of certiorari, when thus issued prior to judgment, being simply to remove the record and proceedings into the superior court, to the end that justice may there be done, by quashing the indictment or information, by proceeding to trial upon it or otherwise as the circumstances of the case may require, it is obvious that it merely brings into play a supervisory jurisdiction, without changing the nature of the case that is to be heard and determined; that a decision by the

[1] The use of the writ of certiorari in conjunction with that of habeas corpus has been a familiar part of the appellate procedure of this court from an early period, under § 14 of the Judiciary Act of 1789, c. 20, 1 Stat. 73, 81; § 716, Rev. Statu.; § 262, Judicial Code; *Ex parte Burford*, 3 Cranch, 448; *Ex parte Bollman and Swartwout*, 4 Cranch, 75, 101; *Ex parte Yerger*, 8 Wall. 85, 103; *Ex parte Lange*, 18 Wall. 163, 166; *Hyde* v. *Shine*, 199 U. S. 62, 85. It is obvious that this use of the certiorari is available before conviction, in a proper case.

An analogous use of the writ, before judgment in the court to which it is addressed, arises under § 239 or § 251, Judicial Code (36 Stat. 1157, 1159), where, upon questions of law being certified to us in any case pending in a Circuit Court of Appeals or in the Court of Appeals of the District of Columbia, this court may require that the whole record and cause be sent up to it, and thereupon decide the whole matter in controversy as if it had been brought here by writ of error or appeal. In such a case the record is brought here by writ of certiorari, with the effect of submitting the cause to this court for decision instead of to the court of appeals.

reviewing court adverse to the accused upon any preliminary matter, and without trial upon the merits, followed by a remittitur to the court below, necessitates further proceedings before that court from the point at which they were interrupted by the allowance of the writ; and that a judgment quashing the writ of certiorari simply removes the obstacle that the writ interposed in the way of further proceedings in the court of first instance, so that a *procedendo* follows as a matter of course. And so are the authorities. "If an indictment be removed after issue joined and remanded, the inferior court shall proceed as if no certiorari had been granted. . . . (It is true, that while it continues on the file, the court cannot award a *procedendo*. But it may be taken off the file, if it have issued *improvide;* and when that is done, a *procedendo* will be granted.)" Bac. Abr., *tit.* Certiorari (K), citing *Rex* v. *Wakefield*, 1 Burr. 485, 488; *Rex* v. *Clace*, 4 Burr. 2456, 2459; *Rex* v. *Micklethwayte*, 4 Burr. 2522. And see Com. Dig., *tit.* Certiorari (G), citing *Anonymous*, 1 Salk. 144, to the effect that if a certiorari be granted to remove an indictment and the cause suggested should afterwards appear false, a *procedendo* should be awarded. See, also, *Kennedy* v. *Gorman*, 4 Cranch C. C. 347, 348; Fed. Cas. No. 7702.

The record in the present case shows that from beginning to end it was recognized that the writ of certiorari was a mere method of removing the information and the proceedings thereon from the police court into the supreme court, for purposes of review; that it was not a new or independent cause, but a mere step in the pending criminal case; so that when the supreme court reached the conclusion that the writ ought be quashed, the result was merely to remove this obstacle in the way of the exercise by the police court of its jurisdiction, and that the record ought to be remanded for further proceedings in that court. The prayer of the petitioner was "that

the writ of certiorari may issue from this court to the respondent, commanding him to certify to this court the record and proceedings in the said cause so as aforesaid instituted and pending against the petitioner, *to the end that the same may be considered by this court*, and that there may be done *in behalf thereof* what of law and right ought to be done in the premises." The writ issued in pursuance of this petition and addressed to the judge of the police court, after reciting that there was "now pending before you a suit between the United States and the above-named petitioner, William A. Hartranft," commanded the judge to send to the supreme court "the record and proceedings in the said cause, *so that the said Supreme Court may act therein* as of right and according to the laws and customs of the United States should be done." And the judgment of the supreme court was that the writ of certiorari be quashed and the petition dismissed, and that the record be "*remanded to the Police Court of the District of Columbia whence it came.*" Clearly, this was an implied mandate for further proceedings in the police court. The judgment for costs was but incidental.

The contention that the certiorari case in the supreme court was independent of the proceeding in the police court because the two cases bore different titles is without weight. The writ ran from the President of the United States to the judge by name, not in his personal but in his official capacity, as being in contemplation of law the custodian of the record (see *State* v. *Howell*, 24 N. J. L. 519; *Kirkpatrick* v. *Commissioners*, 42 N. J. L. 510; *Hutchinson* v. *Rowan*, 57 N. J. L. 530); but the substance of it was a command that the record of the cause pending in the police court be removed into the supreme court for its consideration; and the execution of the writ did not change the nature of the cause but merely transferred it to a different court.

There is a singular and fatal inconsistency between the

grounds on which plaintiff in error invokes our jurisdiction and the ground on which he endeavors to maintain it. He comes saying, in order to bring himself within § 250, Judicial Code, that in this case (a) the jurisdiction of the trial court is in issue, and (b) the construction of a law of the United States was drawn in question by himself as defendant. But, in resisting the objection that the case is one arising under the criminal laws and the judgment is not final, he is obliged to take refuge in the theory that the certiorari proceeding was separate and independent from the police court proceeding. This, if granted, would leave him without a footing here, because in the certiorari proceeding the supreme court was the "trial court," and its jurisdiction was not and is not in issue; and in that proceeding he was prosecutor or plaintiff, not defendant, and it does not appear that the construction of any law of the United States was there drawn in question by defendant in error, who was defendant if the proceeding was an independent one. There is no escape from the dilemma.

From what has been said it results that the decision of the supreme court was a decision in a case arising under the criminal laws; and, since it required further proceedings in the police court before the merits of the case could be determined, it was not a final judgment within the meaning of the opening words of § 250, Judicial Code. By § 226 of the District of Columbia Code, the court of appeals may review interlocutory orders of the supreme court, as well as final judgments; but it is unnecessary to say that if the judgment reviewed was interlocutory, so is the judgment affirming it. Were we to review and affirm the latter judgment, a trial upon the merits in the police court would still be necessary. The bearing of this is manifest. *Macfarland* v. *Brown*, 127 U. S. 239, 246.

Two cases very much in point are to be found in the reports of New Jersey; both being decisions of the court

of last resort. To show their pertinency, it should be premised that in that State the jurisdiction and practice of the supreme court are modeled after those of the king's bench, and there is a review of its decisions by the court of errors and appeals (as in the house of lords), but only after final judgment. The practice of employing the writ of certiorari for the removal of an indictment or presentment before trial from the court of first instance into the supreme court has been recognized from the beginning, and regulated by statutes not departing essentially from the common-law practice. Act of February 6, 1799, Paterson's Laws, p. 350; Rev. Stats. 1847, p. 983; Gen. Stats. 1895, p. 367; P. L. 1903, p. 343; 1 Comp. Stats. (1910), p. 402. Upon the removal of an indictment into the supreme court by this process, if that court determines that the indictment is not sufficient in law, the person indicted is discharged; but if it is found sufficient, the court may in its discretion retain it to be carried down for trial before the proper circuit court, or may order it returned to the court from which it was removed, there to be proceeded with in the same manner as if the writ had not been allowed. It is a common practice to use this writ in order to obtain the judgment of the supreme court upon the validity of an indictment, before trial. *Sailer* v. *State*, 16 N. J. L. 357; *State* v. *Powder Mfg. Co.*, 50 N. J. L. 75; *State* v. *New Jersey Jockey Club*, 52 N. J. L. 493; *State* v. *Nugent*, 77 N. J. L. 157; *State* v. *Kelsey*, 80 N. J. L. 641. Such being the practice, in *Parks* v. *State*, 62 N. J. L. 664, the return to a writ of error issued out of the court of errors and appeals to the supreme court disclosed that the latter court, by certiorari to the sessions, had removed an indictment and entertained and denied a motion to quash it, and ordered the record to be remitted to the sessions to be proceeded in according to law. A motion having been made to dismiss the writ of error, the court, speaking by

Chief Justice Magie, said: "When the Supreme Court, by virtue of its superintending power over inferior courts, brings, by certiorari, into it the proceedings of an inferior court upon an indictment, it has the option, at its discretion, to retain the cause and proceed to a final disposition of the issues presented, or to remit the proceedings to the inferior court. Gen. Stat. 368. Had the Supreme Court retained the cause now before us, it is obvious that no final judgment could have been reached until the accused had been convicted and sentenced or acquitted and discharged by that court. It is equally plain that, after the exercise of its option of remitting the proceedings to the sessions, no final judgment in the cause could have been reached until a similar result had been reached in that court. A *certiorari* in such cases is not the institution of a new suit, nor does it bring in question any final judgment. The result is that this writ was prematurely issued and must be dismissed." To the same effect is *State* v. *Kelsey*, 82 N. J. L. 542.

For both reasons, that the case is one arising under the criminal laws and that the judgment is not final, we have no jurisdiction under § 250, Judicial Code, and the writ of error must be and is

Dismissed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.